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REFORMULATING CHURCH AUTONOMY: HOW *EMPLOYMENT DIVISION v. SMITH* PROVIDES A FRAMEWORK FOR FIXING THE NEUTRAL PRINCIPLES APPROACH

*Andrew Soukup**

INTRODUCTION

Gordon Hensley began working for Newport Church of the Nazarene in 1993 as a youth minister.[1] Eight months later, the church fired Hensley because he disrupted staff cohesiveness and lost the support of church members.[2] After his termination, Hensley filed a claim for unemployment benefits.[3] When the Employment Appeals Board granted his request for benefits, Newport Church challenged the application of the benefits law as an unconstitutional intrusion into its autonomy under the First Amendment.[4] The Oregon Supreme Court rejected the church's argument, concluding that because the unemployment law was neutral and generally applicable, the court could

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1 Newport Church of the Nazarene v. Hensley, 56 P.3d 386, 388 (Or. 2002).

2 Newport Church of the Nazarene v. Hensley, 983 P.2d 1072, 1074 (Or. Ct. App. 1999), *aff'd in part and rev'd in part*, 56 P.3d 386. The church did not initially challenge the Employment Appeals Board's finding that the decision to terminate employment was based on misconduct. *See Newport Church*, 56 P.3d at 393 n.7. If it had, the church would have been excused under Oregon law from paying unemployment benefits. *See Newport Church*, 983 P.2d at 1075. When it attempted to do so at a later stage in the litigation, the motion was denied. *See Newport Church*, 56 P.3d at 393 n.7.

3 *Newport Church*, 56 P.3d at 388.

4 *Id.* at 388, 392.

constitutionally force Newport Church to pay unemployment benefits.[5]

Religious organizations like Newport Church of the Nazarene increasingly rely on the church autonomy doctrine to defend themselves from government regulation and private party litigation. Under the doctrine of church autonomy,[6] which draws its strength from the First Amendment,[7] courts may not review "internal church disputes involving matters of faith, doctrine, church governance, and polity."[8] However, courts may adjudicate disputes involving ecclesiastical entities using so-called neutral principles of law, provided courts ignore doctrinal controversies as they apply those principles.[9] Although the phrase "church autonomy"[10] has appeared only twice in the U.S. Reports—and each appearance consisted of a title of an academic article in a citation[11]—religious organizations have sought the doctrine's protection in a multitude of contexts. Churches have relied on the doctrine in disputes over civil rights,[12] negligent hiring, supervision, and retention,[13] breach of contract,[14] tortious interference with busi-

5 *Id.* at 392–94.

6 Professor Douglas Laycock is widely credited with popularizing this phrase in his influential article, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

7 *See infra* note 62.

8 Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 655 (10th Cir. 2002); *see, e.g.*, Jones v. Wolf, 443 U.S. 595, 603 (1979); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

9 *See Jones*, 443 U.S. at 602; *see also* Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1589 ("The First Amendment, with its doctrine of church autonomy, is a recognition . . . that the civil courts have no subject matter jurisdiction over the internal affairs of religious organizations.").

10 For the purposes of this Note, the phrases "church autonomy" and "the church autonomy doctrine" have different meanings. *See infra* text accompanying notes 37–48.

11 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 341–42 (1987) (Brennan, J., concurring) (quoting Laycock, *supra* note 6, at 1389); *Jones*, 443 U.S. at 620 (Powell, J., dissenting) (citing Paul G. Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, *in* CHURCH AND STATE 67, 90–92, 97–98 (Philip B. Kurland ed., 1975)).

12 *See, e.g.*, EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 800–05 (4th Cir. 2000); Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church, 63 F. Supp. 2d 694, 702–15 (E.D.N.C. 1999).

13 *See, e.g.*, Malicki v. Doe, 814 So. 2d 347, 354–57 (Fla. 2002); Roman Catholic Diocese of Jackson v. Morrison, 905 So. 2d 1213, 1235–38 (Miss. 2005); Gibson v. Brewer, 952 S.W.2d 239, 246–48 (Mo. 1997) (en banc).

14 *See* Gabriel v. Immanuel Evangelical Lutheran Church, Inc., 640 N.E.2d 681, 683–84 (Ill. App. Ct. 1994); McKelvey v. Pierce, 800 A.2d 840, 856–59 (N.J. 2002).

ness relationships,[15] civil conspiracy,[16] clergy malpractice,[17] collective bargaining,[18] sexual harassment,[19] negligent infliction of emotional distress,[20] premises liability,[21] and various procedural issues.[22]

Despite the ease with which courts set forth church autonomy principles, the doctrine creates a myriad of practical and doctrinal problems. In the practical context, the Supreme Court has ruled that courts can constitutionally burden church autonomy as this Note uses the term,[23] but it never defined the degree of permissible interference. Consequently, courts have proven institutionally incapable of drawing a line separating permissible and impermissible infringement on the internal affairs of a religious organization.[24] Defining what constitutes impermissible entanglement with religion is an inherently difficult task.[25] *Newport Church of the Nazarene v. Hensley*[26] aptly illus-

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15 *See* Brazauskas v. Fort Wayne-South Bend Diocese, Inc., 796 N.E.2d 286, 293–94 (Ind. 2003).

16 *See* Hiles v. Episcopal Diocese of Mass., 773 N.E.2d 929, 934–39 (Mass. 2002).

17 *See, e.g.*, Cherepski v. Walker, 913 S.W.2d 761, 767 (Ark. 1996); *see also infra* notes 254–55 and accompanying text (examining courts' approaches to clergy malpractice claims).

18 *See* S. Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch., 696 A.2d 709, 723 (N.J. 1997).

19 *See, e.g.*, Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 655–59 (10th Cir. 2002); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 945–48 (9th Cir. 1999).

20 *See, e.g.*, Dolquist v. Heartland Presbytery, No. Civ.A. 03-2150-KHV, 2004 WL 74318, at *4 (D. Kan. Jan. 15, 2004).

21 *Cf., e.g.*, Stitt v. Holland Abundant Life Fellowship, 614 N.W.2d 88, 102 (Mich. 2000) (holding that a person attending bible study on church premises was a licensee for purposes of a duty of care without considering the First Amendment).

22 *See, e.g.*, Dolquist v. Heartland Presbytery, No. Civ.A. 03-2150-KHV-DJW, 2004 WL 624962, at *2 (D. Kan. Mar. 9, 2004) (permitting deposition of church members when information sought to be discovered was secular); People v. Campobello, 810 N.E.2d 307, 665–67 (Ill. App. Ct. 2004) (enforcing a subpoena in criminal investigation); Soc'y of Jesus of New Eng. v. Commonwealth, 808 N.E.2d 272, 278–79 (Mass. 2004) (enforcing a subpoena in a criminal investigation).

23 This Note defines church autonomy with reference to the internal affairs of a religious institution, even decidedly nonreligious aspects. By contrast, others define church autonomy as the sphere of constitutionally protected religious group activity. The difference is mostly one of semantics, as both approaches ultimately seek to define which religious group activities are immune from government interference. The primary difference in terminology only means that under this Note's definition of church autonomy, *see infra* text accompanying notes 37–40, an action that falls within the definition of church autonomy might not be entitled to constitutional protection; such a result is impossible under other approaches.

24 *See infra* notes 122–26 and accompanying text.

25 The contradictory and conflicting approaches discussed below, *infra* Part I.B, illustrate the intrinsic difficulty in resolving this inquiry. A plethora of scholars have

trates the difficulty of determining when the government unconstitutionally interferes with church autonomy. The church argued that the unemployment law threatened its institutional autonomy in two ways: first, if it was required to disclose and justify its reasons for firing a religious leader, it might not terminate the minister; and second, the burden imposed by paying unemployment benefits might cause the church to refrain from firing a minister. [27] The law imposed a burden on the church-minister relationship, which has historically enjoyed special protection,[28] but the Oregon Supreme Court held that requiring churches to pay unemployment benefits to ministers did not violate the doctrine of church autonomy.[29]

Similarly, in the doctrinal context, some have questioned the viability of the church autonomy doctrine following *Employment Division v. Smith*.[30] In *Smith*, the Supreme Court held that neutral, generally applicable laws that incidentally burden the religious conduct of individuals do not violate the Free Exercise Clause.[31] Supporters of a broad right to church autonomy thus struggle to answer how religious groups can claim that they are exempt from generally applicable laws when individuals lack the same immunity.[32] Indeed, *Newport Church* rested its decision in part on the fact that the principles of *Smith* defeated the church's claim to autonomy.[33]

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already attempted to address the proper scope of the church autonomy doctrine. *See, e.g.*, Symposium, *Church Autonomy Conference*, 2004 BYU L. REV. 1093; *see also* Gerard V. Bradley, *Church Autonomy in the Constitutional Order: The End of Church and State?*, 49 LA. L. REV. 1057 (1989) (arguing for an increase in religious-based political discussion to prevent neutral principles from infringing upon church autonomy); Laycock, *supra* note 6, at 1397 (calling for a broad right of church autonomy that "extends to all aspects of church autonomy"); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002) (examining different perspectives to evaluate the best method for protecting religious freedom).

26 56 P.3d 386 (OR. 2002).

27 *Id.* at 393.

28 *See infra* Part III.C.

29 *Newport Church*, 56 P.3d at 394.

30 494 U.S. 872 (1990).

31 *Id.* at 882–90.

32 *See* Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633, 1635; Perry Dane, *"Omalous" Autonomy*, 2004 BYU L. REV. 1715, 1715–16; Laura S. Underkuffler, *Thoughts on* Smith *and Religious-Group Autonomy*, 2004 BYU L. REV. 1773, 1774.

33 *Newport Church*, 56 P.3d at 392–93. *But see, e.g.*, Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 656 (10th Cir. 2002) (concluding that the church autonomy doctrine remains viable after *Smith* because those cases "address[ ] the rights of the church, not the rights of individuals").

This Note seeks to resolve these practical and doctrinal difficulties by providing courts with a meaningful framework for applying the church autonomy doctrine. This framework reconciles the principles elucidated in *Smith* with historical and precedential evidence favoring constitutional protection for some aspects of church autonomy.[34] Under this framework, courts must first determine whether the applicable rule of decision in a dispute involving a religious organization is a neutral principle of law, which the Supreme Court has defined in a similar context as a rule that does not target beliefs or restrict religious practices purely because of their religious quality.[35] If such a principle exists, courts should presume they can resolve the dispute without unconstitutionally interfering with the internal affairs of a church. Religious entities can rebut that presumption by showing that government action interferes with one of three constitutionally protected spheres of autonomy presently supported by Supreme Court precedent. Based on historical influences and the guiding principles of *Smith*, the church autonomy doctrine avoids the constitutional problems associated with religious-based exemptions for individual conduct and remains consistent with historical attitudes toward religious organizations if it defines spheres where religious activity is protected instead of creating specific religious-based exemptions.

Part I explains how courts, based on the guidance of the Supreme Court, abandoned their historical approach of declining jurisdiction in cases involving religious disputes as they embraced the belief that they could adjudicate such disputes by applying neutral principles of law. However, this jurisprudential shift created an unworkable and inconsistent case-by-case approach, showing why the Supreme Court initially adopted bright-line rules against government involvement in church affairs. Part II argues that historical attitudes toward religious groups and First Amendment principles announced in *Smith* suggest courts should abandon the case-by-case method in favor of a broad presumption that assumes courts can always adjudicate disputes involving religious organizations without violating the First Amendment. Part III suggests that religious organizations can rebut the

34 Some might argue that "church autonomy" only encompasses constitutionally protected activity, *see supra* note 23, but this Note defines this term more broadly for purely semantic reasons. For the sake of clarity, the aforementioned definition of church autonomy is consistent with what this Note calls "constitutionally protected spheres of church autonomy." *See infra* Part III.

35 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993); *see also infra* text accompanying notes 175–80 (explaining how the Court's definition of neutral laws of general applicability in *Lukumi Babalu* can also apply in the church autonomy context).

aforementioned presumption by showing that the government action infringes upon one of three narrowly defined spheres of autonomous conduct that the Supreme Court previously established: dogma, authority, and the church-minister relationship. For those who fear this framework fails to protect religious freedom, Part IV illustrates how other constitutional provisions and the democratic process also adequately safeguard religious group autonomy. While neither approach protects institutional autonomy as well as the robust church autonomy doctrine espoused by some commentators,[36] as a practical matter, legislatures eagerly grant numerous exemptions for religious groups from a variety of laws. Consequently, religious institutions have sufficient means for preserving their internal affairs from government interference, making it unnecessary for courts to determine that new spheres of church activities deserve constitutional protection under the church autonomy doctrine.

I. THE ORIGINS OF THE CHURCH AUTONOMY DOCTRINE

"Church autonomy" and the "church autonomy doctrine" do not mean the same thing. Church autonomy refers to the idea that a religious institution should have control over its polity, faith, doctrine, and other internal affairs.[37] The principle depends for its recognition upon a fundamental right of churches to "'decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"[38] The Supreme Court has never used the phrase "church autonomy" in its opinions to describe its jurisprudence,[39] nor has it addressed the extent of free exercise protection in the context of religious groups since *Smith*. Almost any government action, if applied to churches, can impact church autonomy to some extent. For example, the law at issue in *Newport Church*, from the church's perspective, governed payments a church must make to its employees if it decided to fire them.[40] The law certainly implicated church government, for it influenced the church's decision to fire an employee. It also implicated church doctrine by affecting the church-minister relationship. Without the unemployment law, the church need not take the decision to pay benefits into account; with the

36 *See infra* note 127 (discussing broad conceptions of church autonomy).

37 Laycock, *supra* note 6, at 1373 ("[C]hurches have a constitutionally protected interest in managing their own institutions free of government interference.").

38 EEOC v. Catholic Univ. of Am., 83 F.3d 455, 462 (D.C. Cir. 1996) (quoting Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 116 (1952)).

39 Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1112–13.

40 Newport Church of the Nazarene v. Hensley, 56 P.3d 386, 393 (Or. 2002).

unemployment law, the church knew that a decision to terminate an employee carried a corresponding duty imposed by state law to pay benefits to the employee. In the strictest sense of the word, then, the unemployment law burdened Newport Church of the Nazarene's autonomy.

By contrast, the church autonomy doctrine determines the degree to which the government may constitutionally intrude upon church autonomy. For a legislative body, the church autonomy doctrine provides the standard against which otherwise neutral, generally applicable laws are evaluated.[41] For a court, the church autonomy doctrine establishes a guideline for determining when a court must refrain from exercising full-fledged jurisdiction to avoid violating the First Amendment.[42] The church autonomy doctrine is distinguishable from other religion based constitutional protections because it requires no balancing of the relative interests of a religious organization and the state.[43] For example, an analysis under the Free Exercise Clause requires a compelling governmental interest and least-restrictive-means inquiry.[44] Similarly, the Establishment Clause directs courts to look at the secular purpose and primary effect test.[45] In the context of the church autonomy doctrine, however,

> a balancing test is [not] appropriate to determine to what extent judicial scrutiny of [the plaintiff's] claims would offend the defendants' religious freedoms under either the establishment clause, or the free exercise clause of the First Amendment. The application of First Amendment principles, in circumstances such as these, involves no balancing test. If adjudication of the plaintiff's claims would implicate matters of ecclesiastical relationships, the courts should not intrude.[46]

Notwithstanding the arguments in favor of a broad right to church autonomy, the Supreme Court has indicated that *some* interference with the internal affairs of a church is constitutional.[47] Thus,

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41 *See, e.g., Kedroff*, 344 U.S. at 110.

42 *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 602–07 (1979).

43 L. Martin Nussbaum, Watson v. Jones *and the Doctrine of Church Autonomy*, THE ROTHGERBER JOHNSON & LYONS RELIGIOUS LIBERTY ARCHIVE, Apr. 2003, http://www.churchstatelaw.com/commentaries/watsonvjones.asp.

44 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

45 *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

46 Williams v. Episcopal Diocese of Mass., 766 N.E.2d 820, 825 (Mass. 2002) (citations omitted).

47 *Cf. Jones*, 443 U.S. at 605 (holding that courts do not have to defer to religious factions in all cases); Underkuffler, *supra* note 32, at 1787 ("[G]ranting religious groups sweeping freedom from civil laws carries with it far more costs than benefits.").

while church autonomy refers to the right of a church to manage its internal affairs independent of *any* government interference, the church autonomy doctrine describes the inquiry courts undertake to determine the scope of constitutionally permissible government interference with those affairs.[48]

A. Watson v. Jones[49] *and its Progeny*

The church autonomy doctrine is derived from a line of intra-church disputes in which the Court was asked to determine which faction of a religious organization controlled church property. The first of these decisions, *Watson v. Jones*, involved a disagreement between two factions of a Kentucky church over whether to follow the anti-slavery, pro-federal government policy of the Presbyterian Church's highest tribunal.[50] Both factions claimed ownership of the church property, and one filed suit in federal court.[51] In declining to resolve the dispute, the Court noted that when church members form a hierarchical organization for religious purposes, civil courts must defer to the highest entity on "questions of discipline, or of faith, or ecclesiastical rule, custom or law."[52] The Court provided three reasons for its decision. First, individuals who unite to form hierarchical churches voluntarily agree to abide by the decisions of church authorities, and courts should subsequently give the church authorities' decisions proper deference.[53] Second, civil courts are "incompetent judges" on matters of church teaching.[54] Finally, deference protects the proper boundaries between religion and the state. As the Court said:

> [I]t is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and

48 *See supra* note 23.

49 80 U.S. (13 Wall.) 679 (1871).

50 *Id.* 715–17. This opinion has been called "the *Marbury* of institutional autonomy." Dane, *supra* note 32, at 1716.

51 *Watson*, 80 U.S. (13 Wall.) at 714. *Watson* was decided before *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), as a matter of federal common law because the Court had not yet determined that the First Amendment applied to the states. Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 115–16 (1952).

52 *Watson*, 80 U.S. (13 Wall.) at 727.

53 *Id.* at 729 ("It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance . . . .").

54 *Id.* ("It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to the one which is less so.").

> customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care . . . . This principle would deprive these bodies of the right of construing their own church laws . . . .[55]

Eighty years later, the Court constitutionalized the *Watson* principles.[56] In *Kedroff v. Saint Nicholas Cathedral*,[57] "the Court used some of its broadest language" to describe religious group rights.[58] Following the Russian Revolution, the New York state legislature transferred control of a Russian Orthodox cathedral from Moscow-based religious leaders to American church officials.[59] Relying principally on *Watson*, the Court called the statute unconstitutional.[60] *Watson*, the *Kedroff* Court said, "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[61] Such freedom, the Court said, has constitutional protection under the Free Exercise Clause.[62] The extent of this constitutional protection was evident in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[63] where the Supreme Court struck down a state practice of awarding property to religious factions on the basis of who had

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55 *Id.* at 733–34.

56 Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 447 (1969); *see Kedroff*, 344 U.S. at 116.

57 344 U.S. 94 (1952).

58 Brady, *supra* note 32, at 1640.

59 *Kedroff*, 344 U.S. at 97–98.

60 *Id.* at 110.

61 *Id.* at 116; *see also Presbyterian Church*, 393 U.S. at 446 (stating that the language in *Watson* possessed "a clear constitutional ring").

62 *Kedroff*, 344 U.S. at 116. Despite that statement, the constitutional source of the church autonomy doctrine is decidedly unclear. After *Kedroff*, the Court has said that the doctrine is rooted in the First Amendment without identifying either the Free Exercise Clause or the Establishment Clause as the source. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 712 (1976); *Presbyterian Church*, 393 U.S. at 449. Scholars are split on the issue. *Compare* Arlin M. Adams & William R. Hanlon, Jones v. Wolf*: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1297 (1980) (arguing that the doctrine arises out of the interaction of the Free Exercise and the Establishment Clauses), *and* Dane, *supra* note 32, at 1718–20 (same), *with* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 10–11 (1998) (suggesting that the Establishment Clause "sets apart from the sphere of civil government" matters including "ecclesiastical governance, the resolution of doctrine, the composing of prayers, and the teaching of religion"), *and* Laycock, *supra* note 6, at 1396 (arguing that the doctrine is rooted in Free Exercise concerns).

63 393 U.S. 440 (1969).

most faithfully adhered to church teaching.[64] Such an approach "requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion."[65]

In *Serbian Eastern Orthodox Diocese v. Milivojevich*,[66] the Court later extended the constitutional protection afforded to religious organizations to "disputes over church polity and church administration."[67] A defrocked bishop challenged both his removal and the power of the Serbian Orthodox Church to reorganize his diocese.[68] The Illinois Supreme Court called the bishop's removal invalid because the church did not conduct its decisionmaking process in accordance with the Church's constitution and penal code.[69] The Supreme Court reversed, noting that the Illinois Supreme Court effectively substituted its interpretation of church doctrine for the decision made by the highest church authority.[70] From the Court's perspective, the church decisions at issue concerned a "quintessentially religious" controversy over church discipline[71] and an "issue at the core of ecclesiastical affairs" involving the choice of clergy and diocesan reorganization.[72] Because the First Amendment permits religious groups to "establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters, "the Court ruled that "the Constitution requires that civil courts accept their decisions as binding upon them."[73]

Despite the broad language the Court used in *Watson* and its progeny, those cases only involved narrow questions of intra-church disputes. The subject matter of the disputes centered on control of property,[74] control over appointment of religious leaders,[75] and con-

64 *Id.* at 449–50.

65 *Id.* at 450.

66 426 U.S. 696 (1976).

67 *Id.* at 710.

68 *Id.* at 706–07.

69 Serbian E. Orthodox Church v. Milivojevich, 328 N.E.2d 268, 281 (Ill. 1975), *rev'd*, 426 U.S. 696.

70 *Milivojevich*, 426 U.S. at 722.

71 *Id.* at 720.

72 *Id.* at 721.

73 *Id.* at 724–25.

74 *See id.* at 709; Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 442 (1969); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 95 (1952); Watson v. Jones, 80 U.S. (13 Wall.) 679, 681 (1871).

75 *See Milivojevich*, 426 U.S. at 715–18; Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 10 (1929).

trol over church organization.[76] To resolve those disputes, the Supreme Court concluded that courts would have been required to either interpret religious doctrine in some capacity or interfere in the internal governance of a church. As *Watson* noted: "[R]eligious liberty [is protected] from the invasion of the civil authority."[77] The line of cases beginning with *Watson* and continuing through *Milivojevich* makes clear that some areas of church autonomy are entitled to constitutional protection.

B. Acceptance of Neutral Principles of Law

However, the Supreme Court gradually backed away from its broad pronouncements about the protected scope of church autonomy. The first movement away from an exclusively deferential approach began in *Presbyterian Church*, where the Court noted that "there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded."[78] The Court elaborated on this principle in *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*,[79] affirming in a per curiam opinion the decision of a Maryland court to resolve a church property dispute by relying upon statutory law because the resolution of the dispute "involved no inquiry into religious doctrine."[80] The Maryland court relied on state law, the deeds conveying the property to a local congregation, and the constitution of the religious organization to conclude that no evidence existed suggesting the parent church intended to retain control over the local church property.[81] As the Supreme Court later explained, the provisions of the church constitution were sufficiently express to enable a civil court could analyze them without making an "impermissible inquiry into church polity."[82]

Three Justices, however, noted that a state could adopt one of several approaches for settling church property disputes "so long as it involves no consideration of doctrinal matters."[83] Under the first

76 *See Milivojevich*, 426 U.S. at 721; *Kedroff*, 344 U.S. at 115.

77 *Watson*, 80 U.S. (13 Wall.) at 730. Some commentators have relied upon this language to conclude that church autonomy should receive broad protection. *See infra* notes 181–85 and accompanying text.

78 *Presbyterian Church*, 393 U.S. at 449.

79 396 U.S. 367 (1970) (per curiam).

80 *Id.* at 368.

81 Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 254 A.2d 162, 166–71 (Md. 1969), *aff'd*, 396 U.S. 367.

82 Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 723 (1976).

83 *Md. & Va. Eldership*, 396 U.S. at 368–70 (Brennan, J., concurring).

approach, seen in *Watson*, states could enforce decisions made by a majority of church members (if the church was congregational) or a church tribunal (if the church was hierarchical),[84] provided the court refrained from interpreting ambiguous religious language to determine if a religious tribunal actually had the religious authority it claimed to possess.[85] Under a second approach, embraced in *Presbyterian Church*, courts could determine ownership by relying upon general principles used to resolve property disputes unless their application required an interpretation of religious doctrine.[86] Under a third approach, taken by the Maryland Court of Appeals, courts could apply special statutes passed by state legislatures carefully crafted to avoid the degree of interference seen in *Kedroff*.[87]

Eight years later, a fourth Justice also suggested that the deferential approach of *Watson* did not universally apply.[88] In an in-chambers opinion, then-Justice Rehnquist[89] rejected an argument that the First Amendment prevented courts from examining the structure and operation of a church for purposes of determining whether personal jurisdiction existed based on minimum contacts.[90] In Justice Rehnquist's view, the Supreme Court never suggested that limits on the ability of a court to inquire into and determine matters of ecclesiastical organization and governance applied "outside the context of such intraorganization disputes."[91] Concerns about excessive entanglement in religious doctrine, Justice Rehnquist argued, "are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged."[92]

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84 *Id.*; *see also infra* text accompanying notes 236–39 (explaining how courts determine which faction of a church to which they should defer).

85 *Md. & Va. Eldership*, 396 U.S. at 368–70.

86 *Id.* at 370.

87 *Id.*

88 Gen. Council on Fin. & Admin. v. Cal. Super. Ct., 439 U.S. 1369 (1978) (Rehnquist, Circuit J.).

89 Justice Rehnquist, joined by Justice Stevens, had dissented in *Milivojevich* because "[t]here is nothing . . . to indicate that the Illinois courts have been instruments of any such impermissible intrusion by the State on one side or the other of a religious dispute." Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 733 (1976) (Rehnquist, J., dissenting). Justice Rehnquist saw no difference between the church constitutional provision at issue in *Maryland & Virginia Eldership* and the case at hand. *Id.* at 734.

90 *Gen. Council*, 439 U.S. at 1372–73.

91 *Id.* at 1372.

92 *Id.* at 1373.

Thus, in *Jones v. Wolf*,[93] it was unsurprising when five Justices rejected the argument that "the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved."[94] Writing for the Court, Justice Blackmun expressly endorsed the idea that a state could choose any method of settling a church property dispute provided the ultimate inquiry did not involve any "'consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.'"[95] The neutral principles of law approach at issue in the case (courts evaluated deeds and statutes to determine who owned property) passed constitutional scrutiny because it did not require courts to examine religious doctrine.[96] The Court also suggested that the neutral principles approach had practical advantages over *Watson*-style deference: "The primary advantages of the neutral principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. . . . It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice."[97] The neutral principles approach also promoted "flexibility in ordering private rights and obligations to reflect the intentions of the parties" because it allowed religious organizations to determine how disputes are settled via conventional common law means.[98]

The majority recognized that the neutral principles approach was not "wholly free of difficulty."[99] In particular, courts could not pay attention to "religious precepts" when they examined neutral language.[100] Furthermore, to the extent that religious documents incorporated religious concepts, "the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body" when interpreting religious documents.[101] The four Justices who dissented in *Jones* presciently predicted that the majority's decision probably would require more entanglement into religious doctrine than before[102] and

93 443 U.S. 595 (1979).

94 *Id.* at 605.

95 *Id.* at 602 (quoting Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970) (Brennan, J., concurring)).

96 *Id.* at 603.

97 *Id.* Of course, courts are still required to consider *whether* such entanglement will occur before they can apply the neutral principles approach.

98 *Id.*

99 *Id.* at 604.

100 *Id.*

101 *Id.*

102 *Id.* at 611–14 (Powell, J., dissenting).

noted that the free exercise rights of the individuals associated with a church would be harmed.[103] Instead, the *Jones* dissenters called for a constitutional rule that would require churches to defer to the resolution of the dispute within the church itself.[104] In rejecting the dissent's deference-only position, the *Jones* majority thus presented states with a clearly defined choice between the neutral principles approach approved in *Jones* or the more deferential approach espoused in *Watson*.[105]

C. *The Consequences of Using Neutral Principles*

After *Jones*, courts rapidly adopted the "neutral principles" language to conclude, in a variety of contexts far from the property disputes that gave rise to the doctrine, that they could competently analyze a variety of issues. For example, courts have applied the neutral principles approach to hold churches liable in actions for infliction of emotional distress,[106] defamation,[107] breach of fiduciary duty,[108] sexual abuse,[109] negligent hiring, retention, and supervi-

103 *Id.* at 616.

104 *Id.* at 618.

105 Following *Jones*, most states decided to adopt, in church property disputes, the neutral principles approach the five-Justice majority deemed constitutional. *See, e.g.*, St. Paul Church, Inc. v. Bd. of Trs. of the Alaska Missionary Conference of the United Methodist Church, Inc., 145 P.3d 541, 551–53 (Alaska 2006); Presbytery of Riverside v. Cmty. Church of Palm Springs, 152 Cal. Rptr. 854, 859–60 (Ct. App. 1979); York v. First Presbyterian Church of Anna, 474 N.E.2d 716, 719–21 (Ill. 1984); Presbytery of Elijah Parish Lovejoy v. Jaeggi, 682 S.W.2d 465, 467–69 (Mo. 1984) (en banc); First Presbyterian Church of Schenectady v. United Presbyterian Church, 464 N.E.2d 454, 459–60 (N.Y. 1984); Presbytery of Beaver-Butler v. Middlesex Presbyterian Church, 489 A.2d 1317, 1319–23 (Pa. 1985); Foss v. Dykstra, 342 N.W.2d 220, 222 (S.D. 1983). Others, however, chose to stay faithful to the deferential approach the four-Justice dissent preferred. *See* Fonken v. Cmty. Church of Kamrar, 339 N.W.2d 810, 816 (Iowa 1983); Tea v. Protestant Episcopal Church, 610 P.2d 182, 184 (Nev. 1980); Church of God of Madison v. Noel, 318 S.E.2d 920, 923 (W. Va. 1984).

106 Calvary Christian Sch., Inc. v. Huffstuttler, No. 05-343, 2006 WL 1779525 (Ark. June 29, 2006).

107 *Id.*; Berger v. Temple Beth-El of Great Neck, 756 N.Y.S.2d 94, 96 (App. Div. 2003).

108 Moses v. Diocese of Colo., 863 P.2d 310, 320 (Colo. 1993) (en banc); Fortin v. Roman Catholic Bishop of Portland, 871 A.2d 1208, 1225–27 (Me. 2005). *But see* Wende C. v. United Methodist Church, 776 N.Y.S.2d 390, 394 (App. Div. 2004) (finding that the claim "cannot be resolved in accordance with neutral principles of law, i.e., without any judicial inquiry into religious precepts"), *aff'd*, 827 N.E.2d 265 (N.Y. 2005), *cert. denied*, 126 S. Ct. 346 (2005) (mem.).

109 Doe v. F.P., 667 N.W.2d 493, 498–500 (Minn. Ct. App. 2003).

sion,[110] and breach of contract.[111] The neutral principles approach has not been limited to common law causes of action; courts have concluded they are able to determine the propriety of garnishing wages paid by a religious institution,[112] the validity of applying unemployment laws to religious organizations,[113] and the applicability of civil rights laws[114] and tax laws.[115] In some cases, courts expressly drew on statutory provisions to provide applicable "neutral princi-

110 Rashedi v. Gen. Bd. of Church of the Nazarene, 54 P.3d 349, 353–55 (Ariz. Ct. App. 2002); Malicki v. Doe, 814 So. 2d 347, 360–65 (Fla. 2002). *But see* Mulinix v. Mulinix, No. C2-97-297, 1997 WL 585775, at *6 (Minn. Ct. App. Sept. 22, 1997) (holding that the plaintiff's claims "are fundamentally connected to issues of church governance"); Gibson v. Brewer, 952 S.W.2d 239, 247 (Mo. 1997) (en banc) ("[J]udicial inquiry into hiring, ordaining, and retaining clergy would result in an endorsement of religion, by approving one model for church hiring, ordination and retention of clergy."); S.H.C. v. Lu, 54 P.3d 174, 178–80 (Wash. Ct. App. 2002) (noting that although the defendant's actions "may be secular in this case, that does not address whether a civil court may avoid interpreting doctrine"); L.L.N. v. Clauder, 563 N.W.2d 434, 440–43 (Wis. 1997) (ruling that the court would have to interpret church law to decide negligent supervision claim).

111 Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1359–61 (D.C. Cir. 1990); Scholl v. Scholl, 621 A.2d 808, 810–12 (Del. Fam. Ct. 1992) (divorce settlement requiring husband to cooperate with wife in obtaining a Jewish divorce involved neutral principles); Jewish Ctr. of Sussex County v. Whale, 397 A.2d 712, 714 (N.J. Super. Ct. Ch. Div. 1978) ("[A]rrangements between a pastor and his congregation are matters of contract subject to enforcement in the civil court."), *aff'd*, 432 A.2d 521 (N.J. 1981); Kapsalis v. Greek Orthodox Archdiocese of N. & S. Am., 714 N.Y.S.2d 902, 902 (App. Div. 2000); Rende & Esposito Consultants, Inc. v. St. Augustine's Roman Catholic Church, 516 N.Y.S.2d 959, 961–62 (App. Div. 1987) (seeking specific performance for breach of contract to sell property). However, breach of contract claims cannot concern the employment relationship if it involves a ministerial element. *See* Jae-Woo Cha v. Korean Presbyterian Church, 55 Va. Cir. 480, 481–84 (Cir. Ct. 2000), *aff'd*, 553 S.E.2d 511 (Va. 2001); *see infra* note 257 and accompanying text.

112 Rooney v. Rooney, 669 N.W.2d 362, 367–68 (Minn. Ct. App. 2003). *But see* Malichi v. Archdiocese of Miami, No. 1D05-5108, 2006 WL 3207982, at *5 (Fla. Dist. Ct. App. Nov. 8, 2006) (declining to determine whether a priest is an employee for purposes of receiving workman's compensation because of entanglement problems).

113 Newport Church of the Nazarene v. Hensley, 56 P.3d 386, 392 (Or. 2002).

114 Sacred Heart Sch. Bd. v. Labor & Indus. Review Comm'n, 460 N.W.2d 430, 432–33 (Wis. Ct. App. 1990) (holding that church autonomy protection applied only to religious-based discrimination and not other discriminatory reasons).

115 Church of Scientology of Cal. v. Comm'r, 83 T.C. 381, 462 (1984) (holding that the consultation of church materials and practices to determine whether a religious organization qualified for a tax exemption constituted a proper application of neutral principles of law), *aff'd* 823 F.2d 1310 (9th Cir. 1987).

ples."[116] In short, since *Jones* was decided, virtually every court to consider the church autonomy defense outside of the context of church property disputes has relied on *Jones*'s neutral principles approach, rather than *Watson*'s deferential approach, to decide a case.[117]

Despite its popularity, courts have struggled to properly apply the neutral principles approach. *Jones* suggests that under the church autonomy doctrine, church autonomy can be restricted to some extent. Some restrictions appear clearly unconstitutional; the Supreme Court has repeatedly made clear that neutral principles can only be applied if a court does not have to determine a question of religious doctrine, polity, and practice.[118] But courts often toil to resolve that threshold inquiry, and some even gloss over the issue about whether the applicable principle is even neutral in the first place.[119] As previously mentioned, the Supreme Court approved the neutral principles approach because it promised no unconstitutional entanglement.[120] Yet the *Jones* dissenters correctly pointed out that determining whether a court can apply the neutral principles approach on a case-by-case basis necessarily entails an entangling inquiry into the religious group's organization or doctrinal practices.[121]

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116 Doe v. F.P., 667 N.W.2d 493, 500 (Minn. Ct. App. 2003) (holding that a statute creating liability for sexual misconduct that occurs when one provides "advice, aid, or comfort" could be applied to clergy members).

117 Indeed, the Oregon Supreme Court's decision in *Newport Church* was unusual in that it never defined the neutral principle it sought to apply. Instead, that court concluded that the church autonomy doctrine did not survive *Smith*, and that the unemployment law was one of neutral and general applicability. *Newport Church*, 56 P.3d at 392–93. Alternatively, under a compelling interest test, the court suggested that the states' interest in providing unemployment benefits outweighed any incidental burden on a religious institution. *Id.* at 393–94.

118 Dane, *supra* note 32, at 1737–44.

119 *See, e.g.*, Newport Church of Nazarene v. Hensley, 56 P.3d 386, 392–93 (devoting only one sentence to the neutrality analysis of an unemployment law). *But see* Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459, 463–64 (N.Y. 2006) (spending nearly a full page discussing that a law mandating insurance coverage for contraceptives was neutral even though some religious activities were exempted from the law and not others).

120 *See* Jones v. Wolf, 443 U.S. 595, 604 (1979) ("[T]he promise of nonentanglement and neutrality inherent in the neutral principles approach more than compensates for what will be occasional problems in application."); *cf.* Laycock, *supra* note 6, at 1395 ("[T]he Court agreed unanimously on the goal of church autonomy. The argument turned on whether the dissenters' approach would better implement the decision of the church itself with less secular interference.").

121 *See Jones*, 443 U.S. at 612 (Powell, J., dissenting).

Two competing principles thus exist. Neutral principles are permissible only if no impermissible entanglement with church affairs occurs. Yet as *Watson* said[122] and numerous commentators illustrated,[123] courts are ill-equipped to inquire into religious practices and thus might be unable to determine when impermissible entanglement has occurred.[124] Cases involving allegations of sexual assault by clergy members for negligent supervision best illustrate judicial incompetence to satisfactorily resolve this inquiry on a case-by-case basis. Faced with similar disputes that asked courts to determine whether a Roman Catholic bishop acted reasonably when supervising a priest alleged to have committed an assault, the Florida Supreme Court concluded no impermissible interference would occur[125] while the Missouri Supreme Court held the exact opposite.[126]

The Supreme Court exacerbates the difficulty of conducting case-by-case inquiries by providing only a handful of examples of impermissible intervention, none of which establish a clear guidepost for determining when this excessive entanglement has occurred. The Court's church autonomy line of cases since *Kedroff* all involve the interpretation of church documents. Yet the vast majority of courts facing a church autonomy defense are not called upon to interpret church documents. Instead, they are asked to determine the constitutionality of interference with religious organization, operation, and activity, an issue upon which the Supreme Court has remained silent. In the process of adjudicating church autonomy defenses on a case-by-case basis, courts consistently demonstrate their incapability of inquiring into religious practice and reaffirm the concerns the *Watson* Court originally expressed about having courts adjudicate religiously centered disputes.

In light of the inherent difficulties of applying neutral principles on a case-by-case basis, courts should adopt and rely upon a background principle that determines when they can adjudicate a religious dispute. Four possible outcomes emerge. At one extreme, some scholars suggest courts should find that the First Amendment bars vir-

122 Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871).

123 *See* Brady, *supra* note 32, at 1687.

124 Professor Brady identifies two potential problems when courts attempt to interpret religious doctrine. First, "[c]onflicts between religious doctrine and secular law may exist, but they may not be visible at the outset to either the church or the courts." *Id.* Second, "courts may be stymied by multiple interpretations of church doctrine." *Id.*

125 Malicki v. Doe, 814 So. 2d 347, 360–61 (Fla. 2002); *accord* Roman Catholic Diocese of Jackson v. Morrison, 905 So. 2d 1213, 1226 (Miss. 2005).

126 Gibson v. Brewer, 952 S.W.2d 239, 246–47 (Mo. 1997) (en banc).

tually any intrusion into the inner operation of church affairs.[127] At the other extreme, courts could conclude that neutral principles of law can always be applied, and thus the First Amendment is never violated by regulating any aspect of a church.[128] Neither approach is satisfactory when viewed in light of the Supreme Court's precedents. First, the Supreme Court established in *Jones* that some intrusion into the inner affairs of a church is permissible.[129] Second, the Court's church autonomy precedents, cited approvingly in *Smith*, establish that some areas of church autonomy remain off-limits to government regulations.[130] The other two outcomes involve adopting a rebuttable presumption that either favors or opposes the application of neutral principles. Here, the choice of *Jones*—*Watson*-style deference or neutral principles of law—lives on in another context. If a case-by-case approach is unworkable, if absolute extremes are inconsistent with Supreme Court precedent, and if the Court has shifted toward encouraging more judicial involvement while consistently protecting some areas of autonomy, which way should the presumption operate?

II. THE INFLUENCE OF HISTORY AND *SMITH* ON CHURCH AUTONOMY

A presumption that courts can constitutionally apply neutral principles is preferable to either a case-by-case determination or a presumption against applying neutral principles of law. Two factors guide the determination that courts should presume they are capable of applying neutral principles of law: the historical attitudes toward

127 Brady, *supra* note 32, at 1698 ("[T]he only effective and workable protection for the ability of religious groups to preserve, transmit, and develop their beliefs free from government interference is a broad right of church autonomy that extends to all aspects of church affairs."); Laycock, *supra* note 6, at 1417 ("Any interference with the autonomy of these organizations jeopardizes free exercise rights of their members, including the free development of religious doctrine.").

128 Hamilton, *supra* note 39, at 1216 ("'Church autonomy' is no doctrine at all but rather a theory fundamentally at odds with the Constitution, its history, and the rule of law it institutes."); *cf.* Underkuffler, *supra* note 32, at 1787 ("[G]ranting religious groups sweeping freedom from civil laws carries with it far more costs than benefits.").

129 *See* Jones v. Wolf, 443 U.S. 595, 602–04 (1979). *Jones* established that the application of neutral principles was permissible precisely because the dispute did not require a court to examine religious doctrine. However, as "church autonomy" is used in this Note, the Court in *Jones* essentially resolved the dispute itself instead of declining jurisdiction and granting the religious factions the autonomy to adjudicate the dispute themselves.

130 *See* Employment Div. v. Smith, 494 U.S. 872, 877 (1990); *see also infra* notes 196–206 and accompanying text (reconciling the church autonomy precedents with *Smith*).

religious groups when the Bill of Rights was ratified[131] and the Court's reshaping of free exercise jurisprudence in *Smith*. However, because of historical evidence that also establishes the value of autonomous religious institutions and because the Court has definitively protected some areas of church autonomy, churches can rely on these predefined spheres of influence to rebut this presumption.[132]

A. Historical Influences on the Church Autonomy Doctrine

Two strands of historical thought help influence modern understanding of the church autonomy doctrine. On one hand, shortly after the Constitution's ratification, most believed that religious organizations and the government each had exclusive sovereignty over separate spheres of public life.[133] On the other hand, others feared

131 The use of history to analyze the Religion Clauses is a relatively recent development. *See generally* Lee J. Strang, *The (Re)turn to History in Religion Clause Law and Scholarship*, 81 NOTRE DAME L. REV. 1697 (2006) (summarizing the relatively recent influence of historical materials on the Supreme Court's First Amendment cases). As a result, there is a "seemingly irresistible impulse to appeal to history when analyzing issues under the religion clauses," yet "[t]his tendency is unfortunate because there is no clear history as to the meaning of the clauses." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 17.2, at 1411 (7th ed. 2004).

As Professor Laycock noted, "Church-state relations were a much contested issue at the time of the American Founding, and those debates left an unusually thick record. All sides in modern debates have mined that record, however selectively, for evidence of original understanding." Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1793 (2006). The resulting approach often spirals into an exchange where

> One side cites Madison and Jefferson; the other side cites the defenders of the established church. . . . At least in political and judicial debates, neither side makes much effort to take account of the evidence offered by the other side, or to craft a theory that explains why the Founders accepted government support of religion in some contexts and not in others. . . .
>
> . . . .
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> The use of history has been selective not just in the sense that each side prefers its own half of history, but also in the sense that some prominent history is invoked repeatedly, and other history, less widely known, is largely ignored.

Id. at 1793–94. To avoid falling into this trap, this Note's brief foray into differing historical attitudes toward church autonomy seeks only to present competing perspectives for the purpose of providing a simple overview to promote a holistic understanding of the relevant historical materials.

132 *See infra* Part III.

133 Esbeck, *supra* note 9, at 1393 ("[T]he American solution to the church-state problem was to deny to the civil government its prior authority over inherently religious questions, thus leaving such matters within the sole province of the church.").

the harmful effects of religious groups when supported by government power.[134] When pulled together, both strands support the idea that certain spheres of religious life enjoyed some, but not complete, immunity from government action.

Professor Carl Esbeck's exhaustive analysis of how organized religion and government have coexisted reveals that Americans transplanted from Europe brought the idea that religious institutions and governments enjoyed "dual authority" over public life.[135] Yet Americans differed from their European counterparts because, after the Founding, they gradually declined to prop up religious institutions.[136] The "conventional wisdom" of the time held that "the existence of healthy religious institutions was essential to the health of the state, and that the existence of healthy religious institutions depended on the support and protection of the state."[137] By contrast, "state establishment of religion had exactly the opposite effect."[138]

Under a process Esbeck calls "disestablishment," states withdrew from regulating religious affairs independently of the Establishment Clause, because establishment efforts had the destabilizing effect of "corrupting religion, the clergy, and the church."[139] In Esbeck's view, the dual-authority approach created "coexisting governmental and religious institutions, the former with authority over the civil and the latter having its province over the spiritual."[140] Since the Supreme Court constitutionalized some protections for religious institutions in *Kedroff*,[141] Esbeck argues that "a free church and a limited state has proven best for religion and best for civil government."[142]

Yet this separation was not absolute. At the time of the Founding, the Framers conclusively believed in a broad right to complete freedom of belief[143] but were more wary about the freedom to act.[144] In

134 Hamilton, *supra* note 39, at 1154–56.

135 Esbeck, *supra* note 9, at 1589.

136 *Id.* at 1573.

137 *Id.* at 1573–74.

138 *Id.* at 1574.

139 *Id.* at 1590.

140 *Id.* at 1589.

141 Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 115–21 (1952).

142 Esbeck, *supra* note 9, at 1592.

143 *See, e.g.*, Letter from Thomas Jefferson to James Madison (July 31, 1788), *in* 13 THE PAPERS OF THOMAS JEFFERSON 440, 442–43 (Julian P. Boyd et al. eds., 1956); James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *in* 8 THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rutland et al. eds., 1973).

144 *See* Letter from Thomas Jefferson, *supra* note 143, at 442 ("The declaration that religious faith shall be unpunished, does not give impunity to criminal acts dictated by religious error.").

particular, the Establishment Clause is an example of the founding generation's fear of a religious entity backed by the power of the government.[145] Indeed, the underlying political philosophy of the time (often associated with John Locke) regarded religious liberty as a right to do "what was not lawfully prohibited."[146] The importance of church autonomy was of little concern to nineteenth-century government officials who sought to weaken the Roman Catholic Church by targeting its internal affairs.[147] Instead of embracing a broad view of protecting religious entities, the Framers were fearful of the effects of religion.[148] Even James Madison, the drafter of the First Amendment, worried at the end of his tenure that "'[t]he danger of silent accumulations & encroachments by Ecclesiastical Bodies have not sufficiently engaged attention in the U.S.'"[149]

For this latter group of Framers, the excesses of religious dominance in Europe, including the Inquisitions, the wars between Catholic and Protestant countries, and years of religious-based executions counseled against extending broad protection to the activities of religious institutions.[150] Yet as Esbeck forcefully shows, they coexisted with other groups who firmly believed religious institutions—and therefore society—benefited when government avoided entangling itself with organized religions. Any sound articulation of the church autonomy doctrine must therefore incorporate both attitudes.

B. Lessons from Smith

The First Amendment principles announced in *Smith* also shed light on the direction in which the background presumption should operate. *Smith* has value in the church autonomy context, even though the decision concerned the applicability of a statute to individual conduct, because of the sweeping implications of the opinion's

145 Hamilton, *supra* note 39, at 1145.

146 Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 624 (1990); *see also* City of Boerne v. Flores, 521 U.S. 507, 539 (1997) (Scalia, J., concurring) ("[T]he most plausible reading" of early laws purporting to protect religion "is a virtual restatement of *Smith*: Religious exercise shall be permitted *so long as it does not violate general laws governing conduct.*")

147 Richard W. Garnett, *The Freedom of the Church*, 4 J. CATHOLIC SOC. THOUGHT 59, 77 (2007); *see also* Philip Hamburger, *Illiberal Liberalism: Liberal Theology, Anti-Catholicism, & Church Property*, 12 J. CONTEMP. LEGAL ISSUES 693, 708–10 (2002).

148 Hamilton, *supra* note 39, at 1152.

149 LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 98 (1986) (quoting James Madison, Detached Memoranda, *in* Elizabeth Fleet, *Madison's "Detached Memoranda,"* 3 WM. & MARY Q. 534, 554 (1946)).

150 Hamilton, *supra* note 39, at 1154–56.

Free Exercise jurisprudence.[151] Indeed, for many commentators[152] and courts,[153] *Smith* "provides the most relevant guidance when neutral government regulation impacts the internal affairs of religious groups."[154]

In *Smith*, the Supreme Court held that neutral, generally applicable laws that incidentally burden an individual's free exercise of religion do not violate the First Amendment.[155] The Court declined to apply the compelling interest test articulated in *Sherbert v. Verner*[156] for three primary reasons. First, the compelling interest test is a "constitutional anomaly" because it creates a private right to ignore generally applicable laws, whereas applications of the compelling interest test in conjunction with other constitutional provisions (such as the Speech Clause) are constitutional norms.[157] Second, courts cannot apply the compelling interest test even in instances where the regulated conduct is "central" to an individual's religion because "'[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.'"[158] Notably, the Court cited *Presbyterian* and *Jones* to support its proposition that courts should not "presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."[159] Finally, the Court noted that applying the compelling interest test in every instance effectively creates a presumption that favors invalidating a regulation because of the diversity of religious beliefs—an unacceptable result that would "open the prospect of

151 Employment Div. v. Smith, 494 U.S. 872, 874 (1990).

152 *See* Thomas C. Berg, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 BYU L. REV. 1593, 1606 (noting that *Smith* "has significantly limited free exercise claims and thus has posed a threat to the existence of a constitutional right of autonomy for religious communities"); Brady, *supra* note 32, at 1671–1714; Joanne C. Brant, *"Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275, 276–77 (1994); Hamilton, *supra* note 39, at 1193–96.

153 *See* Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 656–57 (10th Cir. 2002) (concluding that "the church autonomy doctrine remains viable after *Smith*" because the doctrine "addresses the rights of the church, not the rights of individuals").

154 Brady, *supra* note 32, at 1649.

155 *Smith*, 494 U.S. at 878–79.

156 374 U.S. 398 (1963).

157 *Smith*, 494 U.S. at 886.

158 *Id.* at 887 (quoting Hernandez v. Comm'r, 490 U.S. 680, 699 (1989)).

159 *Id.*; *see also id.* at 877 ("The government may not . . . lend its power to one or the other side in controversies over religious authority or dogma.").

constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[160]

At first glance, *Smith* appears to provide little guidance in applying the church autonomy doctrine. The Court said nothing about the extent to which generally applicable laws may place incidental burdens on the conduct of religious organizations. But the Court did appear to preserve the church autonomy doctrine in some form by noting that "[t]he government may not . . . lend its power to one or the other side in controversies over religious authority or dogma."[161] Accordingly, some area of church autonomy remains immune to government regulation; the Court apparently left it to the lower courts to figure out just how much internal activity is off-limits and how to effectively apply neutral principles.

Yet upon closer examination, the *Smith* decision provides several principles to help courts effectively apply the church autonomy doctrine to church action. First, six Justices in *Smith* echo *Watson* in noting the problems inherent in asking courts to determine the centrality of a particular religious belief.[162] In one view, the church autonomy doctrine essentially protects from unconstitutional government interference matters that are "purely spiritual"[163] or fall within the "spiritual epicenter" of a church.[164] Activities that lie outside this spiritual epicenter can be regulated in proportion to their secularity.[165] Such

160 *Id.* at 888–89 (listing examples of exemptions).

161 *Id.* at 877 (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708–25 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445–52 (1969); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 95–119 (1952)).

162 *See Smith*, 494 U.S. at 886–87; *id.* at 906–07 (O'Connor, J., concurring) ("[O]ur determination of the constitutionality of Oregon's general criminal prohibition cannot, and should not, turn on the centrality of the particular religious practice at issue.").

163 A South Carolina court of equity was the first American court to use this phrase in a published opinion. *See* Harmon v. Dreher, 17 S.C. Eq. (Speers Eq.) 87, 131–32 (1843) (holding that the "power of the church is purely spiritual" and cannot impose civil sanctions). Later courts have struck down laws that purport to define religious activity as that which is "purely spiritual." *See* Espinosa v. Rusk, 634 F.2d 477, 480 (10th Cir. 1980), *aff'd*, 456 U.S. 951 (1982); *cf.* Montrose Christian Sch. Corp. v. Walsh, 770 A.2d 111, 122 (Md. 2001) (declaring a statute containing the phrase "purely religious functions" unconstitutional).

164 Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1539 (1979). Among the categories that Bagni considers within the spiritual epicenter are the relationship between a church and a minister, membership policies, religious education, worship, and ritual. *Id.*

165 *See id.* at 1540.

an inquiry, however, effectively requires courts to "determine the place of a particular belief in a religion"[166]—something both *Presbyterian* and *Jones* say is impermissible.[167] If a court is to apply the church autonomy doctrine, it cannot consider "how secular" an activity is, for that establishes the very balancing test the doctrine purports to reject. The fact that religion is implicated in any context is sufficient to raise First Amendment concerns.[168] But by adopting a presumption which assumes government action will not intrude on "purely spiritual" areas, courts create problematic and unworkable secular-religious distinctions. The *Smith* Court concluded it needed to draw a clearly defined rule to avoid troublesome case-by-case inquiries.[169]

The question for the *Smith* Court, and the question courts facing a church autonomy defenses must address, is how courts should construct such a rule. Is every regulation that burdens institutional autonomy presumptively invalid, or do the problems associated with carving out piecemeal exceptions necessitate imposing some generally applicable standard in spite of those burdens? In a sense, this question is analogous to the choice presented by *Jones*—are courts required to defer to the decisions of church administrators, or can they overrule those decisions if neutral principles of law can be applied?[170] The *Smith* Court ultimately concluded that when faced with the danger of proliferating religious-based exemptions, courts should leave decisions about the creation of such exemptions to the political process.[171] As the Court said: "[T]o say that a nondiscriminatory religious practice exemption is permitted, or even that it is desirable, is *not* to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts."[172]

The same principle applies to religious group autonomy. The Supreme Court concluded that incidental burdens on church autonomy, just like incidental burdens on individual religious conduct,

166 *Smith*, 494 U.S. at 887 (majority opinion).

167 *See* Jones v. Wolf, 443 U.S. 595, 602 (1979); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449–52 (1969).

168 Nussbaum, *supra* note 43.

169 *See Smith*, 494 U.S. at 882–89.

170 *Cf.* Berg, *supra* note 152, at 1611–12 (describing one way of viewing *Jones* that finds its approval of neutral principles to be a precedent "for the *Smith* ruling that a neutral, generally applicable law satisfies the Free Exercise Clause no matter how serious a restriction it imposes on religious practice").

171 *See Smith*, 494 U.S. at 890 ("[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.").

172 *Id.* (emphasis added).

could be justified in certain instances.[173] When faced with a decision to proceed with a case-by-case approach or adopt a broad principle, the *Smith* Court chose to adopt a broad principle that favored concluding that incidental burdens on individual conduct caused by neutral, generally applicable laws are constitutional.[174] Although the Supreme Court has not explicitly taken a similar step in the church autonomy doctrine, *Smith* implies that a presumption that favors greater application of neutral principles of law would align the doctrine to existing First Amendment jurisprudence and result in pragmatic benefits.

Admittedly, "neutral principles of law" are not the same as "neutral laws of general applicability." However, the Supreme Court has defined a neutral law as one that does not "target[ ] religious beliefs as such" or have as its "object . . . to infringe upon or restrict practices because of their religious motivation."[175] Although there is no analogous definition for "neutral principles of law," in the church autonomy context, some courts have used the terms "neutral principles of law" and "neutral laws" interchangeably.[176] However, the original concept of "neutral principles of law" developed in the context of property disputes, where principles for interpreting written documents had been well established. As later courts properly noted, neutral principles of law can also be well-established principles espoused in contract[177] and tort[178] actions or supplied by statute.[179] Nothing in the Supreme Court's case law indicates that, for the purposes of the church autonomy doctrine, neutral and generally applicable laws can-

173 *See id.* at 878. In the church autonomy context, incidental burdens can be imposed unless the process of imposing those burdens interferes with matters of faith, doctrine, church governance, and polity. *See infra* Part III. The class of incidental burdens that could be imposed on individual religious conduct was much smaller; such burdens were constitutional only if they were justified by a compelling government interest. *See* Sherbert v. Verner, 374 U.S. 398, 402–03 (1963).

174 *See Smith*, 494 U.S. at 888 ("[W]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.").

175 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

176 *See, e.g.*, Moses v. Diocese of Colo., 863 P.2d 310, 320 (Colo. 1993) ("The 'neutral principles' doctrine . . . allows a court to apply the neutral laws of the state to religious organizations but forbids a court from resolving disputed issues of religious doctrine and practice.").

177 *See, e.g.*, Rende & Esposito Consultants, Inc. v. St. Augustine's Roman Catholic Church, 516 N.Y.S.2d 959, 961–62 (App. Div. 1987).

178 *See, e.g.*, Malicki v. Doe, 814 So. 2d 347, 364 (Fla. 2002).

179 *See, e.g.*, Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 367–68 (1970) (per curiam).

not supply the applicable neutral principle of law. By definition, neutral principles of law neither target religious beliefs nor restrict practices for religious-based reasons. In fact, *Kedroff*, although decided nearly forty years before the Supreme Court supplied a definition of a religiously neutral law, provides an example of a decidedly nonneutral state law.[180] Accordingly, for the purposes of the church autonomy doctrine, the terms "neutral principles of law" and "neutral laws of general applicability" have no practical difference.

Some commentators have argued for an opposite approach, where courts adopt a *Watson*-style deferential approach if a church claims that the civil court resolution of a religious controversy would involve impermissible infringement on church autonomy. Support for this view is drawn from language in *Watson* which suggests that "religious liberty [is protected] from the invasion of the civil authority."[181] As applied by some courts, any decision that requires a court to evaluate the reasonableness of a religious organization's conduct necessarily requires an impermissible evaluation of religious doctrine.[182] Two problems exist with this approach. First, religious groups may not even know when they submit to secular jurisdiction whether an impermissible intrusion might occur.[183] Thus, the right of a church to claim the autonomy defense would depend on its ability to properly recognize the interference of generally applicable laws with church doctrine. Second, allowing a religious organization to determine when the application of "neutral principles" avoids interfering with religious autonomy effectively grants it the power to determine when it can be sued.[184] This kind of presumption operates contrary to the well established doctrine that religious entities are free to believe what they want, but limits are imposed on their ability to act.[185]

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180 *See id.* at 370 (Brennan, J., concurring); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 98 n.2, 99 n.3 (1952).

181 Watson v. Jones, 80 U.S. (13 Wall.) 679, 730 (1871).

182 *See, e.g.*, Gibson v. Brewer, 952 S.W.2d 239, 247 (Mo. 1997) (en banc).

183 *See* Brady, *supra* note 32, at 1687.

184 *Cf.* Roman Catholic Diocese of Jackson v. Morrison, 905 So. 2d 1213, 1229–30 (Miss. 2005) ("For this Court to agree with the Diocese would require us to conclude that ecclesiastical principles could reasonably impose or suggest different requirements for the protection of children from sexual molestation than the requirements generally imposed by society.").

185 *See* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) ("[T]he [First] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."); *see also* Employment Div. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring) ("Under our established

For some, those problems actually counsel in favor of granting broad constitutional protection for church autonomy. Under this view, most recently espoused by Professor Kathleen Brady, the principles in *Smith*, although they facially eliminate religious exemptions, actually stand for a broader protection of religion.[186] Concededly, while *Smith* does support the constitutionality of a presumption favoring the application of neutral principles, it also approvingly cites existing church autonomy precedents and therefore suggests neutral principles of law cannot override *some* aspects of church autonomy. As Brady suggests, *Smith* said nothing about infringing the freedom to believe, only the freedom to act, and religious organizations play a fundamental role in cultivating religious doctrine.[187] Because "[f]ull freedom of belief is not possible without a corresponding right of religious groups to teach, develop, and practice their doctrines and ideas . . . [s]pecial protections for religious organizations are necessary at least where government regulation interferes with religious belief or practice,"[188] and this framework incorporates sufficient protections.

But it goes too far to say, as Professor Brady does, that because courts cannot adequately define the relationship between religious practices and nonreligious practices, churches should enjoy a "broad right of church autonomy that extends to all aspects of church affairs."[189] Brady argues that individual religious beliefs enjoy considerable protection, that those beliefs are often fostered by a religious organization, and that an organization often creates and expresses its beliefs via a variety of religious practices.[190] Yet Professor Brady's forceful claim dances around the dangerous potential of religiously motivated conduct, the chief concern the *Smith* Court sought to address. "Religion, when 'combined' in groups and institutions, wields tremendous social, economic, and political power."[191] In some cases, this power can be used for harmful purposes;[192] in others, it can be used for beneficial purposes.[193] To the extent that broad protec-

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First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute.").

186 *See* Brady, *supra* note 32, at 1636 ("When read carefully, *Smith* supports a broad right of church autonomy that extends to all aspects of church affairs . . . .").

187 *See id.* at 1676.

188 *Id.* at 1677.

189 *Id.* at 1698.

190 *See id.* at 1675–77.

191 Underkuffler, *supra* note 32, at 1786.

192 *See supra* notes 143–50 and accompanying text.

193 In Professor Brady's view, religious groups are "buffers against overweening state power," "enhance individual autonomy," "provide a realm of privacy, intimacy,

tion for religious autonomy benefits society or that religious institutions can regulate themselves, as many suggest, [194] *Smith* definitively established that legislatures should assume responsibility for safeguarding religiously motivated conduct. In this context, organizations should enjoy no more special protection than individuals. "With the religious strife and oppression that currently engulfs vast parts of the world, the view that religious groups should be simply left alone to do good works seems alarmingly inadequate."[195]

The Supreme Court's decision in *Smith* thus directs courts to ignore the burden on religious activity and focus on the neutrality of the principle of law. Accordingly, in the church autonomy context, courts should generally ignore the burden on church autonomy and focus on the neutrality of the law. If the principle supplied by the law is neutral, a court should presume no impermissible interference with religion will occur.

This conclusion clashes with the notion, provided by the *Watson* line of cases, that at least some areas of institutional autonomy are entitled to constitutional safeguards. The principles in *Smith* strongly indicate at least that the scope of constitutionally protected church autonomy has narrowed. Still, two questions remain unanswered. Did *Smith* completely eradicate the *Watson* line of cases, such that *no* areas of church autonomy now deserve constitutional protection? If not, how should courts draw judicially manageable lines so they can consistently determine the spheres of church autonomy with which the government may not constitutionally interfere?

III. THREE SPHERES OF CHURCH AUTONOMY

The most natural question after *Smith* concerns whether the Court left any room for religious autonomy, and if so, how the church autonomy doctrine squares with *Smith*'s attack on religious-based exemptions because they are "constitutional anomalies."[196] *Smith* effectively directed courts to look at the neutrality of the law, not the

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and supportive social bonds," "address[ ] spiritual matters that lie beyond the temporal concerns of government," and "have much to say about the shape of the temporal order." Brady, *supra* note 32, at 1703–04; *see also id.* at 1703–04 nn.403–06 (collecting articles that also express these views).

194 *Cf.* Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. REV. 461, 565 (2005) ("[T]he Court's treatment of religion has traveled from a substantive concern with the distinctive role of religious groups and practices to a less protective, but more generally applicable, fact-intensive focus on formal neutrality.").

195 Underkuffler, *supra* note 32, at 1786.

196 *See* Employment Div. v. Smith, 494 U.S. 872, 886 (1990).

burden on religious conduct.[197] But *Smith* also explicitly left room for specific, albeit narrowly defined, areas of church autonomy.[198]

These seemingly conflicting principles can be reconciled by understanding that unlike an individually granted religious exemption from the law, the church autonomy doctrine is not a constitutional anomaly. *Smith* called religious-based exemptions to generally applicable laws constitutional anomalies in the sense that they demand a private right to ignore the law instead of defining general limits on the reach of law.[199] By contrast, the doctrine of church autonomy focuses on defining boundaries where courts and legislatures cannot interfere, not on carving exemptions on a case-by-case basis.[200]

Professor Perry Dane provides two reasons why church autonomy does not suffer from the same problems as individual religious exemptions. First, the church autonomy doctrine "provides the standard against which various legal regimes can be found objectively sufficient or defective" and "invites and requires exactly the same sort of boundary questions, and answers to those questions, that we find in free speech and other constitutional doctrines."[201] Second, the church autonomy doctrine, unlike an individual based exemption that depends on a purported religious belief, attaches to religious institutions simply because they are religious institutions and not because of the beliefs those institutions claim to protect.[202]

The church autonomy doctrine thus avoids being labeled a *Smith* constitutional anomaly to the extent that it seeks to establish boundaries on the applicability of various laws to religious organizations irre-

197 *See id.* at 878–80; *see also* Gabrielle Giselle Davison, Note, *The "Extreme and Hypothetical" Come to Life:* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 43 CATH. U. L. REV. 641, 659 (1994) ("As long as the state remains neutral in enacting generally applicable laws, it has *no obligation* to prevent whatever incidental burdens those laws may place on religious conduct.").

198 *See Smith*, 494 U.S. at 887.

199 Dane, *supra* note 32, at 1730. Professor Dane points to a "parade of horribles" cited in *Smith* as evidence of the litany of cases where exemptions from the law, not tests on the definition of some constitutional boundary, are problematic and therefore the source of constitutional anomalies. *See id.* at 1729.

200 *See id.* at 1732–36. In Professor Dane's view, religious group autonomy doctrines are constitutional so long as they are discrete, defined, predictable, and apply to religious communities generally. *Id.* at 1735–36.

201 *Id.* at 1734; *see also Smith*, 494 U.S. at 885–86 (calling the application of the Equal Protection Clause and Free Exercise Clause constitutional norms because they produce "equality of treatment and an unrestricted flow of contending speech" and not "a private right to ignore generally applicable laws").

202 Dane, *supra* note 32, at 1734.

spective of individual religious beliefs. Furthermore, as Esbeck shows,[203] creating spheres of autonomy over which religious institutions enjoy exclusive dominion is consistent with historical attitudes toward religious institutions shortly after the ratification of the Bill of Rights.[204]

It seems hypocritical to criticize the current application of the church autonomy doctrine for its arbitrary and inconsistent application by proposing a general principle, and then carve out exceptions to that principle that some might argue would lead to equally inconsistent application. However, this approach best reconciles *Smith* with the existing church autonomy precedents. When viewed in light of *Smith*, the church autonomy precedents stand for the idea that courts can craft at least three exemptions from the general rule that they can constitutionally adjudicate a dispute involving neutral principles of law.[205]

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203 *See* Esbeck, *supra* note 9, at 1589 ("For seventeen centuries now these two centers of authority have at times competed and at times cooperated. While the exact boundaries between the two remain conflicted, it is understood that although the respective jurisdictions overlap at many points, nevertheless there are subject matters over which the state has sovereign power and subject matters over which the church has exclusive authority.").

204 Brady argues that any attempt to define "a set of activities that are inherently or quintessentially religious" is futile. Brady, *supra* note 32, at 1690. She argues that when government officials, including judges, address religious questions in areas different from their own faith traditions, two problems erupt. First, "aspects of church life which are uniquely or quintessentially religious are not obvious." *Id.* Second, "the aspects of church administration that are quintessentially religious differ from group to group." *Id.* at 1692.

Brady's solution to this problem is to extend broad constitutional protection to any internal activity of a church. But her approach runs opposite to the Supreme Court's view espoused in *Smith*. Rather than extend broad constitutional protection to individual free exercise claims, the Court left decisions to grant religious exemptions in the hands of legislatures. This Note follows the Court's position by narrowly defining the scope of constitutional protection, allowing judges to decide when religious group activity falls into areas of protection already identified by the Supreme Court instead of creating new constitutional boundaries, and encouraging legislative bodies to provide additional protection for areas of institutional autonomy that the church autonomy doctrine does not protect with a constitutional rule. *See infra* notes 280–98 and accompanying text.

205 The three exemptions from this generally applicable rule are a church's freedom to define and interpret its own religious doctrine, *see infra* Part III.A, a church's freedom to determine its own organizational structure, *see infra* Part III.B, and a church's freedom to govern the relationship with its ministers, *see infra* Part III.C. *Cf.* Dane, *supra* note 32, at 1730–36 (suggesting that the church autonomy doctrine is consistent with *Smith* insofar as it avoids created case-by-case exemptions from generally applicable laws).

The Supreme Court has explicitly defined two spheres of church autonomy, one that involves a church's freedom to determine and interpret its religious doctrine and another that protects a church's power to organize its internal structure. Lower courts, drawing on inferences from Supreme Court precedent, uniformly embrace a third sphere, albeit in different degrees, governing the relationship between a minister and a church. If a court presumes that it can constitutionally apply the neutral principles approach, a religious group could rebut that presumption by showing that the government action involves intrusion into one of these three spheres of protected activity.[206]

A. *Power over Doctrine*

The first sphere of religious group autonomy prohibits courts from defining or interpreting religious doctrine and adjudicating religious controversies between different factions of a church. Such an approach is proper, the Supreme Court has said, because "[i]t is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own."[207]

The Court emphasized this principle in *Milivojevich* when it rebuked the Illinois Supreme Court for its chosen approach for resolving a church controversy. The Illinois Supreme Court purported to apply "neutral principles" to determine whether the Serbian Orthodox Church had the power under its constitution to divide the American-Canadian Diocese into three Dioceses.[208] The state court made its determination by concluding that the early history of the American-Canadian Diocese "manifested a clear intention to retain indepen-

206 These spheres ultimately overlap to some extent. For example, a decision to hire and fire a minister involves the church's authority over its internal structure. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 717 (1976). Such a decision also involves its power to define its own doctrine through the minister. *See* McClure v. Salvation Army, 460 F.2d 553, 559 (5th Cir. 1972) ("The minister is the chief instrument by which the church seeks to fulfill its purpose."). *But cf. infra* note 237 (discussing how courts can nevertheless consult written church documents if the process does not require interpreting religious doctrine).

Others might say that these are not spheres of constitutionally protected autonomy. Instead, they might point out that the Supreme Court has said *any* infringement with church autonomy is unconstitutional. The chief difference between these positions is that this Note defines the phrase "church autonomy" broadly, while other commentators have defined the phrase "church autonomy" narrowly to include what this Note calls constitutionally protected autonomy.

207 Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871).

208 *See Milivojevich*, 426 U.S. at 707–08.

dence and autonomy" while becoming "ecclesiastically and judicially an organic part of the Serbian Orthodox Church."[209] The court interpreted the constitutions of the American-Canadian and Serbian Orthodox Church constitutions to support its historical determination.[210] The Supreme Court called the Illinois court's approach unconstitutional because it "substituted its interpretation of the . . . [church] constitutions for that of the highest ecclesiastical tribunals in which church law vests authority to make that interpretation."[211] The Court expressly rejected the purported application of neutral principles of law in this context because it involved an impermissible interpretation of religious law.[212] In the end, the dispute hinged on whether the religious documents were sufficiently clear. Because the Supreme Court believed they were not, the Illinois Supreme Court erred because it resolved a religious controversy by rejecting the church's interpretation of its own religious materials.[213]

As a general principle, this class of religious disputes often arises in one of two ways. First, a legislature might pass a law mandating the method by which a religious organization must (or must not) worship.[214] The Supreme Court has emphatically rejected the power of a legislative body to define the procedures by which a church can worship,[215] and the handful of opinions that present evidence of such cases indicate that churches enjoy considerable success defending this sphere of autonomy.[216] Accordingly, when a government entity attempts to define how a church may worship, the church's internal affairs are protected by the church autonomy doctrine.

Second, a party may challenge a church's power to act a certain way by referring to religious documents. If the documents are not "so express that the civil courts could enforce them without engaging in a

209 Serbian E. Orthodox Diocese v. Milivojevich, 328 N.E.2d 268, 283 (Ill. 1975), *rev'd*, 426 U.S. 696.

210 *See id.* at 282–84.

211 *Milivojevich*, 426 U.S. at 721.

212 *See id.* at 722–24. Then-Justice Rehnquist believed, however, that there was no difference between the case at hand and the religious provisions at issue in *Maryland & Virginia Eldership*. *Id.* at 734 (Rehnquist, J., dissenting); *see supra* note 89.

213 *See Milivojevich*, 426 U.S. at 721.

214 *See, e.g.*, Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1341–46 (4th Cir. 1995); Ran-Dav's County Kosher, Inc. v. State, 608 A.2d 1353, 1363–65 (N.J. 1992) (state law regulating products sold as kosher unconstitutionally defined Jewish doctrine regarding what constituted kosher).

215 *See* Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 107–08 (1952).

216 *Cf., e.g.*, *Barghout*, 66 F.3d at 1340–46 (striking down state law because it violated the Establishment Clause). Such a result is generally unsurprising, because these laws are almost always specifically targeted at religious activity.

searching and therefore impermissible inquiry into church polity," then the court must decline to hear the dispute.[217] Otherwise, a court violates *Milivojevich* by interpreting the religious documents at issue. Thus, when a court attempts to interpret a religious precept, and the court's interpretation of that religious tenet differs from the interpretation proffered by the church, the church autonomy doctrine protects the religious organization's interpretation.

Courts have frequently found that they lack jurisdiction when the dispute involves different factions of a religious organization.[218] By contrast, when a dispute involves a religious organization and a nonaffiliated party, courts regularly declare they do not have to resolve a religious controversy to adjudicate the dispute.[219] Here, an important distinction must be drawn between religious doctrine and religious motives. Religious doctrine is often implicated when a party asks a court to determine what a religious provision means. Unless that religious provision is express, courts may not interpret the provision and must refrain from exercising jurisdiction.[220] However, religious motives describe religious-based reasons for acting a certain way; in this case, courts can usually constitutionally adjudicate the dispute.

Consider a hypothetical situation involving a church opposed to abortion that decides to lease land for an abortion clinic. A faction of the church's supporters file suit seeking an injunction because the church's religious law prevents it from leasing its land to abortion supporters. Unless the faction's argument relies upon a provision sufficiently clear to enable the court to resolve the dispute without interpreting the provision (and by extension, religious doctrine), the court should decline to exercise jurisdiction over the dispute and instead defer to the position advocated by the highest church authority.[221]

Now suppose that the church decides to break its agreement to lease the land and the abortion clinic files suit alleging a breach of contract. As a defense, the church argues that performance is impractical because its religious laws forbid leasing land to abortion providers. While the church has a religious motive for breaching its

217 *Milivojevich*, 426 U.S. at 723. Of course, what constitutes "express" is hard to determine. *See id.* at 734 (Rehnquist, J., dissenting).

218 *See, e.g., id.* at 715–16 (majority opinion); *Kedroff*, 344 U.S. at 114–17; Watson v. Jones, 80 U.S. (13 Wall.) 679, 733–34 (1871).

219 *Cf. supra* notes 177–78 and accompanying text (explaining how courts readily adjudicate contract and tort disputes involving churches and nonaffiliated parties).

220 *Milivojevich*, 426 U.S. at 723.

221 *See infra* notes 236–39 and accompanying text (explaining the methods by which courts determine what faction is the church's highest authority).

contract, courts can still apply neutral principles of law to adjudicate the dispute. Under the presumption adopted in Part II, a court should conclude it can decide the merits of the case because it will not unconstitutionally interfere in church autonomy. Because religious motives—and not religious doctrine—are at issue, a court should treat the religious-based justification for failing to honor the contract the same as an economic-based reason.[222]

B. Power over Structure

Church structure disputes involve the power of a church to determine its own organizational structure as well as determine who within the church has ultimate decisionmaking power to resolve certain religious controversies. Support for a church's freedom to determine its own structure comes directly from *Kedroff* and *Milivojevich*. The Court in *Kedroff* struck down a state statute declaring what faction had control over a Russian church's property.[223] Religious freedom, the Court said, includes the "power to decide for themselves, free from state interference, matters of church government . . . ."[224] Nor can judges broadly declare which faction of a church has power to make decisions; the role of courts in such disputes is carefully prescribed by the Supreme Court.[225] Likewise, in *Milivojevich*, the Court declined to exercise jurisdiction over a challenge to a restructuring of the Serbian Orthodox Church, holding that "the reorganization of the Diocese

222 *Cf.* Rende & Esposito Consultants, Inc. v. St. Augustine's Roman Catholic Church, 516 N.Y.S.2d 959, 961–62 (App. Div. 1987) (holding that disputes involving a title to real property in a case where a church's board of trustees failed to approve the a contract previously signed with a developer could be settled by applying neutral principles of law).

223 *Kedroff*, 344 U.S. at 110.

224 *Id.* at 116.

225 *See* Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190, 190–91 (1960) (per curiam); *infra* notes 236–39 and accompanying text. After the Court handed down its decision in *Kedroff*, the New York Court of Appeals remanded the case to consider a common law issue not addressed by the Court's *Kedroff* opinion, which was decided on statutory grounds. *Kreshik*, 363 U.S. at 191. Following trial, the Court of Appeals entered judgment in favor of the petitioners and awarded them control over the church property. *See id.* The Supreme Court reversed, noting that "the decision now under review rests on the same premises which were found to have underlain the enactment of the statute struck down in *Kedroff*" and that "it is established doctrine that '[i]t is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize.'" *Id.* (quoting NAACP v. Alabama, 357 U.S. 449, 463 (1958)).

involves a matter of internal church government, an issue at the core of ecclesiastical affairs."[226]

This sphere of autonomy produces the greatest confusion. Does control over church "government" and "authority" include control over all aspects of the internal affairs of a church? Or does it include exclusive control only over some limited aspects, with the government possessing the power to regulate the rest? While the Supreme Court has not expressly ruled on the extent of this protection, lower courts generally conclude that the internal decisionmaking power of a church can be infringed upon by statute only if the intrusion does not affect the structure of the church.

For example, in *Catholic Charities of the Diocese of Albany v. Serio*,[227] several religious organizations protested the application of a neutral, generally applicable law that required them to provide insurance coverage for contraceptives.[228] The organizations objected to financing what they believed was sinful activity.[229] On one hand, the application of the law clearly had an effect on organizational governance—it effectively forced the religious organizations to compensate their employees in a specified manner.[230] On the other hand, as the New York Court of Appeals ultimately concluded, the law "merely regulates one aspect of the relationship between plaintiffs and their employees."[231]

The Supreme Court's previous jurisprudence is instrumental in understanding that the *Catholic Charities* court properly applied the church autonomy doctrine. The language in Supreme Court cases concerns "religious controversies"[232] and issues of "authority."[233] Unlike *Watson*, *Kedroff*, and *Milivojevich*, where the dispute concerned *who* had decisionmaking power within a religious organization, *Catholic Charities* involved a question of *whether* the church had religious autonomy. The distinction is extremely significant. A dispute of the kind seen in *Watson* is a quintessential structural dispute between factions of a religious organization over the power to make decisions on

226 Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721 (1976).

227 859 N.E.2d 459 (N.Y. 2006).

228 *Id.* at 461.

229 *Id.* at 463.

230 *See id.* at 461.

231 *Id.* at 465.

232 Jones v. Wolf, 443 U.S. 595, 608 (1979); Gen. Council on Fin. & Admin. v. Cal. Super. Ct., 439 U.S. 1369, 1373 (1978) (Rehnquist, Circuit J.); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976).

233 *Jones*, 443 U.S. at 605; *Milivojevich*, 426 U.S. at 715; Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 106 (1952).

behalf of that organization. By contrast, the church has no power to say its authority over internal affairs is burdened by the application of a neutral law.[234] Such power effectively creates religious-based exemptions in the organizational context when those exemptions are anomalous in the individual context. The application of a neutral law of general applicability will almost never interfere with church authority under this sphere of the church autonomy doctrine.[235]

If, however, a court concludes that the application of a neutral principle of law would effectively alter the structure of a religious organization, it can only exercise limited jurisdiction for the sole purpose of determining to what faction a court should defer. *Watson* asks courts to distinguish between hierarchical and congregational churches.[236] Such deference is appropriate, *Watson* says, because parties that exercise the right to associate and form a religious organization implicitly agree that the organization has sole jurisdiction over religious-based disputes.[237] Accordingly, in a congregational church, courts defer to the decisions made in accordance with the congregation's internal decisionmaking process;[238] in a hierarchical church, courts defer to the decisions made by the church's highest religious authority.[239]

C. *Power over the Ministerial Relationship*

The aforementioned spheres of church autonomy each involve disputes between different factions of a religious organization. The third sphere draws on aspects of those two spheres and suggests that

234 *See supra* Part II. A natural counterargument to this claim is that courts consistently refuse to apply Title VII, a neutral law, to ministerial employees. *See infra* notes 245–46 and accompanying text. However, churches enjoy Title VII protection not because it interferes with the sphere of autonomy protecting church authority, but because it interferes with the sphere of autonomy protecting the church-minister relationship. *See infra* Part III.C.

235 *See, e.g.*, *In re* Roman Catholic Archbishop of Portland in Or., 335 B.R. 842, 852 (Bankr. D. Or. 2005) ("[T]he question of whether property is part of the bankruptcy estate under the Bankruptcy Code does not require [resolving] matters of faith, doctrine, or governance.").

236 *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 722–29 (1871).

237 *See id.* at 729. Of course, the dogmatic sphere of church autonomy allows a court to consult written documents to determine to which faction of a religious organization it should defer only if the provisions are sufficiently express so that it avoids interpreting religious doctrine.

238 *See id.* at 724–25.

239 *See id.* at 726–27.

religious organizations enjoy a varied amount of freedom over the church-minister relationship.[240]

This sphere of autonomy draws its strength from *Gonzalez v. Roman Catholic Archbishop*.[241] The petitioner claimed a right to a religious appointment, but the Catholic Church refused to appoint him because he did not meet the established qualifications.[242] Ruling for the church, the Supreme Court said that "[b]ecause the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them."[243] Furthermore, the Court noted that "[i]n the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive."[244]

Courts have adopted a categorical rule that allows churches to hire and fire ministers. The "ministerial exception" is the most common application of this sphere of the church autonomy doctrine.[245] Courts of appeals have unanimously found that the ministerial exception protects churches from liability in Title VII employment disputes.[246] The principal controversy concerning the ministerial exception governs its scope—who exactly can courts consider a "min-

240 *See* Brady, *supra* note 32, at 1651–56 & nn.110–44 (describing the application of the ministerial exception and collecting cases).

241 280 U.S. 1 (1929). Like *Watson*, *Gonzalez* was decided as a matter of federal common law. Laycock, *supra* note 6, at 1389 n.129.

242 *See Gonzalez*, 280 U.S. at 12–13.

243 *Id.* at 16. As the Court later said, "[f]reedom to select the clergy, where no improper methods of choice are proven . . . must now be said to have federal constitutional protection as part of the free exercise of religion against state interference." Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 116 (1952).

244 *Gonzalez*, 280 U.S. at 16.

245 The Fifth Circuit was the first court to explicitly recognize this exception in *McClure v. Salvation Army*, 460 F.2d 553, 558–61 (5th Cir. 1972). Other circuits have followed suit. *See infra* note 246.

246 *See* Petruska v. Gannon Univ., 462 F.3d 294, 305 (3d Cir. 2006); Alicea-Hernandez v. Catholic Bishop, 320 F.3d 698, 702–04 (7th Cir. 2003); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1303–04 (11th Cir. 2000); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 945–50 (9th Cir. 1999); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 (8th Cir. 1991); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168–69 (4th Cir. 1985). The Court of Appeals for the D.C. Circuit explicitly concluded the ministerial exception survived *Smith*. *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463–67 (D.C. Cir. 1996).

ister" for the purposes of the exception?[247] Courts have expanded the ministerial exception to include church officials beyond ordained clergy.[248] For example, courts have considered a communications officer,[249] a director of music ministry,[250] and a teacher at a religious university[251] to fall within the exception. In a few cases, the question of who can be considered a "minister" (compared to an administrative worker) hinged on a determination of the role religion played in a decision to terminate an employee.[252] Yet for the most part, courts have not required a religious element—if a church-minister relationship is implicated, courts refrain from adjudicating the dispute.[253]

The church-minister relationship receives protection outside the Title VII context, but courts are split over the extent of that the protection. For example, courts have overwhelmingly rejected claims of clergy malpractice.[254] Courts justify such decisions by concluding that

247 *Compare* EEOC v. Miss. Coll., 626 F.2d 477, 485 (5th Cir. 1980) (suggesting that ministers include those who are "intermediaries between a church and its congregation" who "attend to religious needs of the faithful [or] instruct students in the whole of religious doctrine"), *with Rayburn*, 772 F.2d at 1169 (stating more broadly that a determination of who is a minister hinges on the question of "whether a position is important to the spiritual and pastoral mission of the church"), *and* Bagni, *supra* note 164, at 1545 (defining ministers as those whose "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual or worship").

248 *See* Brady, *supra* note 32, at 1653.

249 *Alicea-Hernandez*, 320 F.3d at 704.

250 EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 805 (4th Cir. 2000).

251 *Catholic Univ. of Am.*, 83 F.3d at 457.

252 *See, e.g.*, Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 628 (1986) (stating that a state administrative board "violates no constitutional rights by merely investigating the circumstances of [an employee's] discharge . . . if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge"); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 947 (9th Cir. 1999) (declining to apply the ministerial exception in the absence of any "religious justification for the harassment"); McKelvey v. Pierce, 800 A.2d 840, 851 (N.J. 2002) ("Although the church autonomy doctrine provides a shield against excessive government incursion . . . [it] is implicated only in those situations where 'the alleged misconduct is rooted in religious belief.'" (quoting Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 657 (10th Cir. 2002))).

253 *See* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (holding that in "'quintessentially religious' matters, the free exercise clause . . . protects the act of a decision rather than a motivation behind it" (citation omitted) (quoting Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 720 (1976))).

254 *See, e.g.*, Cherepski v. Walker, 913 S.W.2d 761, 767 (Ark. 1996) (holding clergy malpractice was not a cognizable claim); Nally v. Grace Cmty. Church, 763 P.2d 948, 961 (Cal. 1998) (rejecting a malpractice claim where a suicide allegedly resulted from

the application of a neutral principle of law—determining the appropriate standard of conduct for a religious leader—necessarily requires an inquiry into religious principles.[255] Churches have also enjoyed protection from defamation claims arising out of church communications[256] and in lawsuits governing a breach of an employment contract.[257]

However, some courts express reluctance to protect church autonomy when the church-minister relationship can be regulated by statute and does not interfere with either of the two other spheres of church autonomy. For example, many courts conclude that some aspects of the church-minister relationship can be regulated, including whether a fired minister can receive unemployment benefits,[258] whether ministers may organize under state collective bargaining laws,[259] whether religious employees are empowered to receive broad insurance coverage,[260] and whether supervisors can be found liable

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failed religious counseling); Mabus v. St. James Episcopal Church, 884 So. 2d 747, 763–64 (Miss. 2004) (finding that clergy malpractice claims would "excessively entangle" the court with religious tenets); Schieffer v. Catholic Archdiocese, 508 N.W.2d 907, 912 (Neb. 1993) (acknowledging the "constitutional difficulties" in adjudicating a clergy malpractice claim); *In re* Pleasant Glade Assembly of God, 991 S.W.2d 85, 89–90 (Tex. App. 1998) (finding that the First Amendment barred inquiry into the proper application of church doctrine). *But see* Odenthal v. Minn. Conference of Seventh-Day Adventists, 649 N.W.2d 426, 438–41 (Minn. 2002) (holding that a negligence claim can proceed based on neutral legal principles provided by statute). Some courts have distinguished breach of fiduciary duty from clergy malpractice, and found courts can adjudicate the former because "the former is a breach of trust and does not require a professional relationship or a professional standard of care, while the latter is an action for negligence based on a professional relationship and a professional standard of care." Moses v. Diocese of Colo., 863 P.2d 310, 321 n.13 (Colo. 1993).

255 *Nally*, 763 P.2d at 960 (reasoning that defining a standard of care for clergy malpractice "would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity").

256 *E.g.*, Klagsbrun v. Va'ad Harabonim of Greater Monsey, 53 F. Supp. 2d 732, 742 (D.N.J. 1999), *aff'd*, 263 F.3d 158 (3d Cir. 2001); Se. Conference Ass'n of Seventh-Day Adventists, Inc. v. Dennis, 862 So. 2d 842, 843–44 (Fla. Dist. Ct. App. 2003); Downs v. Roman Catholic Archbishop of Balt., 683 A.2d 808, 811–13 (Md. Ct. Spec. App. 1996); Patton v. Jones, No. 03-04-00389-CV, 2006 WL 2082974, at *3–4 (Tex. App. July 28, 2006).

257 *See* Goodman v. Temple Shir Ami, Inc., 712 So. 2d 775, 777 (Fla. Dist. Ct. App. 1998) ("Inquiring into the adequacy of the religious reasoning behind the dismissal of a spiritual leader is not a proper task for a civil court.").

258 *See* Newport Church of the Nazarene v. Hensley, 56 P.3d 386, 394 (Or. 2002).

259 *See* S. Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch., 696 A.2d 709, 723–24 (N.J. 1997).

260 *See* Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459, 465 (N.Y. 2006) ("The existence of a limited exemption for ministers from antidiscrimina-

for negligence in clergy abuse cases.[261] Ultimately, determining the extent to which the church-minister relationship should be protected by the church autonomy doctrine far exceeds the scope of this Note. It suffices to say that when it comes to the church-minister relationship, churches generally enjoy complete protection to hire and fire ministers but exercise considerably less discretion in other contexts if the applicable standard of care has been defined by statute.

D. Possible Exceptions to These Spheres

The aforementioned spheres of religious autonomy often overlap as they prohibit courts from applying the neutral principles of law approach. However, some language in Supreme Court opinions suggests the protection provided by these spheres is not absolute. The Court said in *Gonzalez* that decisions of church tribunals must be deferred to "[i]n the absence of fraud, collusion, or arbitrariness."[262] The Illinois Supreme Court seized on the "arbitrariness" language in *Milivojevich*, concluding that the Serbian Orthodox Church had arbitrarily determined that a bishop should be defrocked.[263] The Supreme Court reversed, holding that such actions involved impermissible interpretation of religious doctrine[264]:

> For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense "arbitrary" must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits . . . [because it undermines the general rule that] a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.[265]

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tion laws does not translate into an absolute right for a religiously affiliated employer to structure all aspects of its relationship with its employees in conformity with church teachings.").

261 *See, e.g.*, Malicki v. Doe, 814 So. 2d 347, 360–64 (Fla. 2002); Roman Catholic Diocese of Jackson v. Morrison, 905 So. 2d 1213, 1241–42 (Miss. 2005).

262 Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929).

263 *See* Serbian E. Orthodox Church v. Milivojevich, 328 N.E.2d 268, 281–82 (Ill. 1975), *rev'd*, 426 U.S. 696 (1976).

264 *Milivojevich*, 426 U.S. at 721–23.

265 *Id.* at 713.

With the arbitrariness exception thus prohibited, it is unclear to what extent the other perceived prohibitions might exist.[266] For example, a court struggles to apply the fraud exception without involving itself in a religious inquiry. The essence of a fraud claim is a material misrepresentation, and the process of determining whether a misrepresentation occurred would necessarily require a court to determine the content of religious doctrine.[267] In any event, no court has relied on the language of *Gonzalez* to evaluate and interpret religious doctrine in cases of fraud or collusion.

IV. External Protections for Church Autonomy

This proposed framework for applying the church autonomy doctrine already has several inherent protections for church autonomy. First, before a court presumes it can apply a "neutral principle of law," it must first determine whether that "principle of law" is in fact neutral. Under the Court's neutrality definition, a court can apply a principle of law if it does not target beliefs or restrict religious practices purely because of their religious quality.[268] Second, a church can rebut this presumption and protect its autonomy by proving that the application of the neutral principle of law interferes with one of the three aforementioned constitutionally protected spheres of autonomy.

This framework does not address the entire universe of protection for religious-group autonomy. In addition to the protections already built into this framework for fixing the church autonomy doctrine, the *Smith* Court provided two external methods by which religious institutions can protect church autonomy. First, *Smith* hinted that other constitutional provisions might adequately protect individual religious practices.[269] Second, *Smith* noted that when other constitutional protections do not exist, legislatures could step in to create religious-based exemptions.[270] In the church autonomy context, the

266 Then-Justice Rehnquist apparently believed that the provisions survived. *See* Gen. Council on Fin. & Admin., v. Cal. Super. Ct., 439 U.S. 1369, 1372–73 (1978) (Rehnquist, Circuit J.).

267 *See* Paul Horwitz, *Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion*, 47 DePaul L. Rev. 85, 143–50 (1997).

268 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993); *see also supra* notes 175–80 and accompanying text (exploring the connection between the *Lukumi Babalu* standard of neutral laws and court-defined neutral principles).

269 *See* Employment Div. v. Smith, 494 U.S. 872, 881–82 (1990).

270 *See id.* at 890.

latter method has proven far more successful at protecting the values espoused by those who favor broad protection of church autonomy.

While other constitutional provisions theoretically provide alternative sources of protection,[271] courts are relatively hostile to such arguments. For example, lower courts rejecting a church autonomy defense frequently also consider whether the Free Exercise Clause or the Establishment Clause has been violated.[272] Many statutes that attempt to distinguish between "secular" and "religious" activity for the purposes of creating exemptions may conflict with the Establishment Clause.[273] Likewise, free exercise problems may develop if a state passes laws that impermissibly interfere with a church's religious activities.[274] No court has rejected a church autonomy defense, yet held government action unconstitutional under either of the Religion Clauses.[275] It accordingly remains unclear how much the Religion

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271 *See id.* at 881–82.

272 *See, e.g.*, Roman Catholic Diocese of Jackson v. Morrison, 905 So. 2d 1213, 1224–37 (Miss. 2005). This argument is stronger if one believes that the church autonomy doctrine draws its constitutional strength from both the Religion Clauses. *See supra* note 62.

273 *Cf. infra* notes 302–04 and accompanying text (providing guidelines for drafting statutes designed to exempt religious activities from certain laws).

274 As the Supreme Court has said, "a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Smith*, 494 U.S. at 877 (alterations in original). Professor McConnell suggests, under a view that the Constitution never requires a religious exemption, that

> religious believers and institutions cannot challenge facially neutral legislation, no matter what effect it may have on their ability or freedom to practice their religious faith. Thus, a requirement that all witnesses must testify to facts within their knowledge bearing on a criminal prosecution . . . if applied without exception, could abrogate the confidentiality of the confessional. Similarly, a general prohibition on alcohol consumption could make the Christian sacrament of communion illegal, uniform regulation of meat preparation could put kosher slaughterhouses out of business, and prohibitions of discrimination on the basis of sex or marital status could end the male celibate priesthood.

Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1418–19 (1990). Courts that cite McConnell's passage often label such "hypothetical laws" to be "well beyond the bounds of constitutional acceptability." Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459, 467 (N.Y. 2006). The mere fact that legislatures do not pass such sweeping laws implicitly speaks to the protection the Religion Clauses provide.

275 One possible explanation for this conduct is that when faced with a violation of the First Amendment, a court will simply ignore a church autonomy defense given the murky state of the doctrine.

Clauses independently protect church autonomy when the doctrine itself fails.

Smith also noted that the only instances where a neutral, generally applicable law did not apply to religiously motivated conduct involved the application of the Free Exercise Clause in connection with some other constitutional protection.[276] Although commentators have largely scoffed at these so-called hybrid constitutional rights,[277] at least one court has relied on this language in *Smith* to excuse a church from liability.[278] Finally, *Smith* suggested that religious individuals could bring suits seeking to protect their free association rights on grounds informed by First Amendment principles.[279] However, no religious organization has specifically relied on this passage in *Smith* to successfully protect some aspect of church autonomy.

Second, *Smith* declared that legislatures, not courts, should create individual-based exemptions to generally applicable laws.[280] Admittedly, a clear constitutional rule established by courts generally protects a constitutional right better than trusting a legislature to protect

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276 *Smith*, 494 U.S. at 881–82.

277 In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1992), Justice Souter attacked the concept of hybrid rights as "ultimately untenable," writing:

> If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Id. at 567 (Souter, J., concurring); *see also* Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception"*, 108 PENN ST. L. REV. 573, 587–609 (2003) (chronicling the lack of success of hybrid rights challenges following *Smith*); Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith*, 75 N.Y.U. L. REV. 1045, 1060–73 (2000) (exploring how *Smith*'s hybrid rights discussion has confused lower courts).

278 *See* Brazauskas v. Fort Wayne-South Bend Diocese, Inc., 796 N.E.2d 286, 293 (Ind. 2003). *But see id.* at 294–96 (Sullivan, J., concurring in part and dissenting in part) (questioning whether the church autonomy doctrine survived *Smith* and suggesting that even if it did, neutral principles could be applied to adjudicate the case at hand because neither party suggested that the position at issue would have involved ministerial-type duties).

279 *See Smith*, 494 U.S. at 882.

280 *See id.* at 890.

that same right.[281] As a practical matter, however, legislatures have not hesitated to grant religious institutions a plethora of exemptions. In the United States Code alone, churches enjoy numerous exemptions from otherwise generally applicable laws,[282] age-based[283] and disability-based discrimination laws,[284] certain kinds of tax laws,[285] land use regulations,[286] gambling laws,[287] labor laws,[288] and fair housing laws.[289] In fact, one study concluded that since 1989, "more than 200 special arrangements, protections, or exemptions for religious groups or their adherents" were codified in federal law.[290] Indeed, the problem is not that churches receive too few exemptions; the proliferation of these religious-based exemptions at the federal, state, and local levels has drawn some criticism.[291] The same concerns about placing

281 *See id.* ("It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in . . . ."); *id.* at 902 (O'Connor, J., concurring) ("[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility.").

282 42 U.S.C. § 2000e-1 (2000); *see also* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329–30 (1987) (holding that § 2000e-1 does not violate the Establishment Clause).

283 *See* Hankins v. Lyght, 441 F.3d 96, 106–07, 109 (2d Cir. 2006). In *Hankins*, the court concluded that the Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C. § 2000bb-1, carved out a religious-based exemption to the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634. *Id.*

284 42 U.S.C. § 12187.

285 I.R.C. § 501(c)(3) (including churches in the list of charitable and other nonprofit corporations that can qualify for tax-exempt status). *But see* Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 392 (1990) (holding that religious-based organizations must pay a generally applicable sales tax when selling religious materials).

286 Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000 § 2(a)(1), 42 U.S.C. § 2000cc(a)(1).

287 18 U.S.C. § 1955(e).

288 *Cf.* NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 504–07 (1979) (construing the National Labor Relations Act, 29 U.S.C. §§ 151–169, to exclude parochial schools from compliance with the Act).

289 42 U.S.C. § 3607(a).

290 Diana B. Henriques, *Religion Trumps Regulation as Legal Exemptions Grow*, N.Y. TIMES, Oct. 8, 2006, § 1, at 1.

291 *See* Diana B. Henriques, *As Religious Programs Expand, Disputes Rise over Tax Breaks*, N.Y. TIMES, Oct. 10, 2006, at A1 (discussing property tax exemptions); Diana B. Henriques, *Religion Based Tax Breaks: Housing to Paychecks to Books*, N.Y. TIMES, Oct. 11, 2006, at A1 (explaining how ministers "are exempt from income tax withholding and can opt out of Social Security"); Henriques, *supra* note 290 (discussing how churches enjoy exemptions from state day care licensing requirements, civil rights laws, tax reporting requirements, land use restrictions, and broadcasting restrictions); Diana B. Henriques, *Sharing the Health Bills: A Ministry's Medical Program Operates Beyond Regula-*

responsibility for the creation of individual religious exemptions in the political process perceived in *Smith* apply with equal force in the context of religious groups: "[L]eaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."[292]

However, giving legislatures, and not courts, the responsibility to create these religious-based exemptions correctly acknowledges that legislatures are better equipped to determine the proper scope of these protections.[293] For example, the New York State Assembly struggled to define who was a "religious employer" for purposes of determining who could claim they were exempt from a requirement to provide insurance coverage for contraceptive methods.[294] One option would define a religious employer as any "'group or entity . . . supervised or controlled by or in connection with a religious organization or denominational group or entity.'"[295] A second and narrower definition required prospective religious employers to satisfy a four-prong test.[296] Based on extensive analysis of the issue, and after hearing significant testimony from both sides, the legislature ultimately adopted the narrower definition.[297] By contrast, a court decision on such an important policy matter could only be based on the facts and views of the parties to the dispute.[298]

In crafting these statutory exemptions, legislatures should keep in mind two drafting principles. First, when faced with a decision about whether a legislature meant to apply a neutral, generally applicable law to a religious organization, courts will construe an ambiguous statute to exclude the religious organization. The seminal case is *NLRB v. Catholic Bishop of Chicago*,[299] where the Supreme Court concluded Congress did not intend for the National Labor Relations Act to apply

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tors' Reach, N.Y. TIMES, Oct. 20, 2006, at C1 (describing what some state officials call "unregulated health insurance"); Diana B. Henriques, *Where Faith Abides, Employees Have Few Rights*, N.Y. TIMES, Oct. 9, 2006, at A1 (exploring the ministerial exception).

292 Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

293 *See* Hamilton, *supra* note 39, at 1193–96.

294 N.Y. INS. LAW § 3221(*l*)(16)(A) (McKinney 2006).

295 Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459, 462 (N.Y. 2006) (quoting S.B. 3, § 14, 2001–02 Reg. Leg., 224th Sess. (N.Y. 2001)).

296 *See id.* at 461 (quoting N.Y. INS. LAW § 3221(*l*)(16)(A)(1)).

297 *See id.* at 461–62; *cf.* Hamilton, *supra* note 39, at 1195 (noting how a legislature "brings better tools to assess the exemption options than a court has available" because "[i]t can study the issue from many angles, from listening to constituents to using hearings, experts, and appointed commissions").

298 *See* Hamilton, *supra* note 39, at 1196.

299 440 U.S. 490 (1979).

to teachers in religious schools.[300] However, other courts more readily concluded that legislatures intended labor laws to cover religious employers.[301] Second, when defining what entities qualify for exemptions, legislatures should carefully craft such statutory exemptions in light of existing Establishment Clause jurisprudence. The Supreme Court has clearly recognized that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[302] But while legislative bodies can use the word "religion" in statutes, they should avoid defining the scope of the religious conduct with particularity. Laws and regulations can exempt certain religious activities and not others,[303] but they cannot create so-called religious tests.[304]

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300 *Id.* at 507 ("[I]n the absence of a clear expression of Congress' intent . . . we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.").

301 *E.g.*, S. Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch., 696 A.2d 709, 713–14 (N.J. 1997) (concluding that the New Jersey Constitution was meant to cover workers not protected by the National Labor Relations Act, and therefore included the employees of a religious school). Unlike in *Catholic Bishop*, where the Supreme Court "avoided the constitutional claims that were asserted," *id.* at 714, the Supreme Court of New Jersey ultimately concluded that the state constitution did not violate the First Amendment. *Id.* at 714–24.

302 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987).

303 *See* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 76–95 (Cal. 2004); Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459, 464 (N.Y. 2006). The law at issue in both cases exempted religious entities for whom "the inculcation of religious values is the purpose of the entity," "[t]he entity primarily employs persons who share the religious tenets of the entity," "[t]he entity serves primarily persons who share the religious tenets of the entity," and the "entity is a nonprofit organization" as defined by the Internal Revenue Service. CAL. HEALTH & SAFETY CODE § 1367.25(b)(1) (West 2000); *see also* N.Y. INS. LAW § 3221(*l*)(16)(A)(1) (McKinney 2006) (containing identical language to the California statute).

304 *See, e.g.*, Espinosa v. Rusk, 634 F.2d 477, 481–82 (10th Cir. 1980), *aff'd*, 456 U.S. 951 (1982). In *Espinosa*, the court struck down a local ordinance that required organizations to obtain a permit to conduct a solicitation drive. The ordinance exempted "religious" activities, which included solicitations by religious groups "solely for 'evangelical, missionary or religious but not secular purposes.'" *Id.* at 479 (quoting local ordinance at issue). The ordinance also defined secular as "'not spiritual or ecclesiastical, but rather relating to affairs of the present world, such as providing food, clothing, and counseling.'" *Id.* (quoting local ordinance at issue). As the court said, the attempt to define "that which is religious and that which is secular" is "necessarily a suspect effort." *Id.* at 481.

CONCLUSION

Religious organizations serve a valuable function in society. Those who have argued for an expansive right to church autonomy, free from government regulation except in the most extreme cases, point to the intrinsic value of strong church independence and the resulting need for a deferential doctrine of religious group autonomy.[305] As a normative matter, such views have merit. However, from a historical and precedential perspective, and in light of the practical problems with applying the church autonomy doctrine, those broad claims are misplaced.

After *Jones*, courts need not extend absolute deference to religious organizations as a constitutional matter. However, they have struggled to consistently determine when the application of neutral principles of law constitutes unconstitutional interference with the internal affairs of a church. In light of demonstrated judicial incompetence to make such decisions on a case-by-case basis, the historical attitude toward religious groups evident at the time of the Founding, and the First Amendment principles announced in *Smith*, courts should simply presume they can properly apply neutral principles of law. It makes no difference whether the common law or statutory provisions provide the applicable neutral principle.

All is not lost for those seeking strong protection for the internal affairs of a church. Under this Note's framework for evaluating a church autonomy claim, churches could rebut this general presumption by showing how government action interferes with one of three constitutionally protected spheres of autonomy. First, the government cannot infringe upon the power of a church to declare how it will worship or interpret its own religious doctrine. Second, the government cannot interfere with the power of a church to make broad structural decisions or adjudicate other internal religious disputes regarding which faction of a church has the power to govern. Third, the government cannot interfere with the power of a church to hire and fire its ministers, and other aspects of the church-minister relationship may also lie beyond the power of the government. Even if

305 *See* Kathleen A. Brady, *Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom From and Freedom For*, 49 VILL. L. REV. 77, 167 (2004) (suggesting that broad freedom from government interference enables religious organizations to "preserve[e] new visions of social life *for* us all"); Garnett, *supra* note 147, at 82 (arguing that broad religious freedom is important "for the role that it plays not only in securing religious freedom and pluralism under constitutionally limited government, but in facilitating the development and flourishing of persons").

the church autonomy doctrine does not provide adequate protection, or when courts err about the degree of impermissible intervention that may occur, other constitutional provisions and legislative action might defend church autonomy.

While the church autonomy doctrine generally serves a normative good by providing limited protection for religious freedom, religious institutions cannot escape liability for their actions as a constitutional matter insofar as government entities can regulate their conduct by neutral principles of law. This framework corrects the problems inherent in case-by-case application of the church autonomy doctrine and, like *Smith*, imposes burdens upon church autonomy rather than extend religious institutions carte blanche to do as they please. Furthermore, *Smith* establishes that courts—and by extension, the Constitution—have little to say when it comes to constructing religious exemptions from generally applicable laws. Instead, as the Court correctly noted and as this framework entails, the proper entity for granting additional religious-based exemptions "shall be the people."[306]

306 City of Boerne v. Flores, 521 U.S. 507, 544 (1997) (Scalia, J., concurring).